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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND LEON HENSON,

Defendant and Appellant.

F036144

(Super. Ct. No. 643538-2)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Lawrence Jones, Judge.

John Hardesty, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Stan Cross and Brett H. Morgan, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On February 24, 2000, a first amended information was filed in Fresno County Superior Court charging appellant Raymond Leon Henson with count I, attempted premeditated murder of a peace officer, Aaron Kilner (Pen. Code,[1] § 664, subds. (a), (e), (f); § 187, subd. (a)); count II, assault with a firearm upon a peace officer, Aaron Kilner (§ 245, subd. (d)(2)); count III, kidnapping for purposes of carjacking of Wayne Mulholland (§ 209.5, subd. (a)); count IV, carjacking of Wayne Mulholland (§ 215, subd. (a)); and count V, unlawfully taking or driving a vehicle owned by Robert Speechly (Veh. Code, § 10851, subd. (a)).

As to counts I through IV, it was alleged appellant personally and intentionally discharged a firearm (§ 12022.53, subd. (c)) and personally used a firearm (§§ 12022.53, subd. (b), 12022.5, subd. (a)(1)). It was further alleged appellant suffered three prior serious felony convictions (§ 667, subd. (a)), three prior serious and/or violent felony convictions within the meaning of the three strikes law (§ 667, subds. (b)-(i), § 1170.12), and served two prior prison terms (§ 667.5, subd. (b)), all based on his convictions for three counts of burglary in Illinois in 1997. Appellant pleaded not guilty and denied the special allegations.

On May 1, 2000, appellant's jury trial began. On May 8, 2000, the court granted the prosecution's motion to amend the information as to count III, to charge appellant with attempted kidnapping of Mr. Mulholland (§§ 664, 207).

On May 11, 2000, the jury found appellant not guilty of count I, attempted murder, but guilty of the lesser offense of attempted voluntary manslaughter of Aaron Kilner (§§ 664, 192, subd. (a)), and found that appellant knew the victim was a peace officer engaged in the performance of his duties. As to counts II through V, the jury found

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

appellant guilty as charged. As for the firearm enhancements, the jury found as to counts III and IV that appellant did not personally and intentionally discharge a firearm (§ 12022.53, subd. (c)). The jury found the remaining firearm enhancements true. Appellant waived a jury trial on the bifurcated matter of the prior convictions, and the court found all the prior conviction allegations true.

On July 19, 2000, the court sentenced appellant to a determinate term of 36 years, with a consecutive indeterminate term of 54 years to life in prison. As to count II, assault with a firearm upon a peace officer (§ 245, subd. (d)(2)), the court sentenced appellant to the third strike term of 27 years to life, with a consecutive 20-year term for the section 12022.53, subdivision (c) firearm enhancement, one consecutive five-year term for the section 667, subdivision (a) serious felony enhancement, and one consecutive one-year term for the section 667.5, subdivision (b) prior prison term enhancement.[2]

As to count IV, carjacking (§ 215, subd. (a)), the court imposed the third strike term of 27 years to life (three times the upper term), and a consecutive 10-year term for the section 12022.53, subdivision (b) firearm enhancement, with the terms in count IV to be served consecutively to the terms imposed in count II.

As to count I, attempted voluntary manslaughter (§§ 664, 192, subd. (a)), the court imposed 25 years to life plus 10 years for the section 12022.5, subdivision (a)(1) firearm enhancement, and as to count III, attempted kidnapping for carjacking (§§ 664, 207), 25

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[2] To determine appellant's minimum indeterminate third strike term for counts II and IV, the court selected "option (i)" and tripled the upper term to 27 years as "the term otherwise provided as punishment" for the current conviction, pursuant to Penal Code section 667, subdivision (e)(2)(A)(i). (*People v. Dotson* (1997) 16 Cal.4th 547, 552; *People v. Dozier* (2000) 78 Cal.App.4th 1195, 1202.) The court only imposed one prior serious felony enhancement because the three prior convictions were not brought and tried separately. The court also imposed only one prior prison term enhancement because appellant only served one prison term arising from the three prior convictions.

years to life plus 10 years for the section 12022.53, subdivision (b) enhancement. The terms imposed for counts I and III were stayed pursuant to section 654. As to count V, unlawfully taking or driving of a vehicle, the court imposed 25 years to life, but ordered the conviction and third strike term "stayed" pursuant to *People v. Garcia* (1999) 20 Cal.4th 490.[3]

On July 21, 2000, appellant filed a timely notice of appeal.

FACTS

Around 1:00 a.m. on November 5, 1999, Robert Speechly's son parked his black 1987 Chevrolet Caprice sedan in front of their home in Fresno County, and locked the doors. Shortly afterward, Mr. Speechly and his son heard the sound of broken glass and looked outside. They saw another vehicle parked alongside their sedan, and then both the sedan and the second car drove away from the area. Mr. Speechly and his son went outside and discovered their sedan was gone and found broken glass on the street where it had been parked. Mr. Speechly reported his stolen vehicle to the Fresno County Sheriff's Department.

Shortly after midnight on November 12, 1999, Fresno County Sheriff's Deputy Aaron Kilner was on solo patrol when he observed a black sedan, later identified as Mr. Speechly's stolen car, traveling at an increased rate of speed on Princeton Avenue in Fresno. Deputy Kilner accelerated his patrol car but did not activate his signal lights, and tried to catch up with the black sedan. The vehicle slowed down and Deputy Kilner was able to read the license plate number, and he called it in for a vehicle check. Deputy Kilner closely followed the black sedan and was able to observe the driver, later

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[3] In *Garcia*, the Supreme Court held the trial court could dismiss prior strike convictions attached to each count, pursuant to section 1385, subdivision (a) as long as such a ruling did not fall outside the "'"bounds of reason" under the applicable law and the relevant facts ….'" (*People v. Garcia*, *supra*, 20 Cal.4th at p. 503.)

identified as appellant Raymond Henson, as he watched Kilner through the sedan's rearview mirror.

As Deputy Kilner followed the sedan, it slowly rolled through a stop sign at the intersection of Princeton and Valentine. Deputy Kilner received a dispatch that the license plate number was reported as a stolen vehicle, and activated the signal lights on his patrol car to conduct a traffic stop. However, appellant accelerated the vehicle as it crossed Shields Avenue and Kilner decided to pursue the stolen car instead of waiting for the backup officers to arrive. A high-speed chase ensued, with appellant's sedan reaching speeds of 70 to 75 miles per hour as he went through the intersection of Parkway and Shields.

Deputy Kilner remained in contact with the dispatcher and backup officers as the chase continued. Appellant drove into a field and seemed to lose control of his vehicle, and it crashed into a building near Marks and Princeton. Immediately after the crash, appellant emerged from the stolen vehicle and ran toward a nearby fence which was adjacent to Highway 99. Deputy Kilner continued the pursuit in his patrol car. Deputy Kilner caught up with appellant and pulled in front of him to block his path to the highway. Appellant ran into the right front side of the patrol car, passed in front of the headlights, briefly leaned against the hood, and looked directly at Deputy Kilner.

As appellant continued to run, Deputy Kilner emerged from his patrol car and continued the pursuit on foot. Both Kilner and appellant ran at a full sprint, as Kilner followed appellant across Marks toward Princeton and came within 20 yards of appellant. As Kilner chased appellant, he pulled out his handgun and shouted, "'Stop! Sheriff's Department! Stop! Sheriff's Department!'" Kilner followed appellant as he ran into a field. Appellant suddenly slowed and turned around toward Kilner. Kilner testified that he saw a muzzle flash and heard a bullet go past him. The flash came from the front of appellant, as if he faced Kilner. Kilner believed he heard only a single round fired at him, and it sounded like a small caliber weapon. Deputy Kilner immediately returned fire and

emptied his .45-caliber service revolver, which was loaded with an eight-round magazine and had one round already in the chamber. Deputy Kilner paused and made radio contact to advise the backup officers that shots had been fired, then he reloaded his service revolver with a new eight-round magazine.

Despite the exchange of gunshots, appellant ran toward the intersection of Marks and Princeton and Deputy Kilner continued the pursuit. Deputy Kilner thought he reloaded his weapon incorrectly, and cleared his revolver and reloaded the magazine. Appellant ran to the southeast corner of a building and again turned around and faced Kilner. Kilner fired one round at appellant because he believed appellant was going to shoot at him again. Appellant ran around the corner of the building, and Kilner slowed down to take cover.

In the meantime, Wayne Mulholland was driving his Ford pickup and towing a travel trailer, and proceeding west on Princeton. As he approached the intersection at Marks, he heard four to five gunshots and two ricochets off the pavement, and immediately slowed down. Mr. Mulholland observed appellant emerge from behind the building at the intersection. Appellant ran toward Mr. Mulholland's truck and jumped into the passenger side of the cab. Mr. Mulholland kept a large amount of personal property on that side of the cab, and appellant had trouble getting into the truck. As he climbed into the passenger side, his weapon discharged and fired one round, and he yelled, "'Drive, son of a bitch!'" Mr. Mulholland saw a muzzle flash and heard the report as the weapon discharged, but the weapon was never pointed at him. However, Mr. Mulholland believed appellant was trying to shoot him. Mr. Mulholland tried to floor his truck, but he decided to jump out of the driver's door because he was afraid of being shot. Mr. Mulholland "bailed out" into the street while appellant remained on the passenger side of the front seat.

California Highway Patrol Officers Jeff Andriese and Chris Fief were on patrol when they observed the flashing lights on Deputy Kilner's abandoned patrol car. They

checked the radio traffic and learned about the car chase and shots being fired, and immediately joined in the pursuit. As they approached the area, they observed Mr. Mulholland's truck and trailer slowly driving across the lanes and into the intersection. The officers then observed Mr. Mulholland roll out of the driver's side of the truck and fall into the street. Mr. Mulholland jumped up and was frantic, and yelled that he had been shot and someone stole his truck.[4] Officer Andriese realized that Mr. Mulholland was not the suspect, and continued to follow the truck.

Deputy Kilner had remained against the side of the building for cover, and watched Mr. Mulholland's truck swerve through the intersection while being followed by the CHP squad car. Kilner didn't know where appellant was, but he heard someone yell: "'Get that son of a bitch.'" Kilner saw Mr. Mulholland lying in the street, and realized appellant was in the truck.

Deputy Kilner, Officers Andriese and Fief, and Mr. Mulholland watched the truck and trailer as it crashed into a chain link fence. Appellant climbed out of the truck and started to run. Officers Andriese and Fief emerged from their patrol car and continued the chase on foot. They identified themselves, drew their weapons, and shouted at appellant to stop. Appellant ran about 15 yards from the truck until he finally yielded to the officers' orders and stopped. Appellant raised his hands and appeared to throw away the weapon, and laid down on the ground.

Officers Andriese and Fief took cover behind the truck, and were joined by Deputy Kilner. They ordered appellant to stay on the ground, and waited for the backup units to arrive before they took custody of appellant at gunpoint. A .25-caliber semi-automatic handgun was found about four to five feet from the area where appellant

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[4] Mr. Mulholland was not shot, but he suffered minor injuries from jumping from the truck into the street.

finally surrendered in the street. The .25-caliber handgun was still in the "fire" position, and there was an empty magazine in it. The magazine was capable of holding at least two live rounds. There was one expended casing jammed into the chamber. The officers were unable to find any expended .25-caliber casings at the scene. There were no fingerprints on the .25-caliber handgun.

Appellant was searched, and the officers found an empty holster on his belt. Appellant had a small flashlight and a screwdriver in his pockets. He had a wrist brace on his right hand. Officer Andriese described appellant as fully cooperative when he was taken into custody. He appeared to be shaken up, but didn't complain about any injuries or claim he was shot. However, Officer Fief observed blood on the rear of appellant's pants.

An examination of Mr. Mulholland's truck revealed a single bullet hole in the roof of the driver's side of the cab. The bullet hole was directly above the steering wheel, within a foot of where Mr. Mulholland's head would have been while seated in the driver's seat. The bullet entered the top of the cab directly above the steering wheel, and exited through the roof of the cab. A search of the chase scene revealed Deputy Kilner's 10 expended .45-caliber cartridge casings, one live .45-caliber round, and an empty .45-caliber magazine. Kilner's spent casings were dented as if they had been stepped on or run over by a car.

Finally, the officers examined Mr. Speechly's stolen sedan, which appellant had crashed into the building. There was damage to the steering column and the windows were shattered. Mr. Speechly later inspected his recovered vehicle, and discovered the roof and door were crashed in, the back windows were shattered, and the steering column was destroyed. Mr. Speechly never gave appellant or anyone else permission to take his car.

Appellant's pretrial statements

Deputy Michael Kennedy arrived at the scene, and took custody of appellant from Deputy Kilner. Appellant was in handcuffs and didn't appear to be injured. Deputy Kennedy escorted appellant to an ambulance to be checked for any injuries. As they walked to the ambulance, appellant started to complain about some pain and Kennedy noticed there were bullet holes in his jeans. Kennedy placed appellant in the ambulance, and removed the handcuffs so Paramedic Clark Sumner could remove his pants and conduct an examination. Kennedy observed wounds in appellant's buttocks and realized he had been shot. Kennedy testified the ambulance remained parked at the scene for about 10 minutes while the paramedic treated appellant. Thereafter, Kennedy stayed with appellant in the ambulance as he was transported to University Medical Center. The trip to the hospital took about 10 to 15 minutes.

Deputy Kennedy testified that appellant spontaneously talked about the incident while he was being treated in the ambulance. Deputy Kennedy had no prior information as to the circumstances of the incident before appellant started to talk to him.

> "He was -- he had said that he had done something stupid, the cops were chasing him, and because he was in a stolen car. But he also stated that he was not the one that stole it. And he was also telling paramedic Sumner that he wanted to apologize to the deputy because he knew he had a family, or he knew he might have family like he does."

Deputy Kennedy testified that he interrupted appellant in order to advise him of the *Miranda* warnings.

> "I asked him if he had ever been advised of his Miranda warnings. And he said that he had, that he had memorized them but could not remember them at this time."

Deputy Kennedy then proceeded to read the advisements to appellant at approximately 12:40 a.m., while they were en route to the hospital.[5]

After Kennedy read the advisements, appellant stated he understood the warnings and would speak with him. Appellant then said that "he had made a big mistake, he was scared, he didn't know what to do. He continuously, throughout the entire discussion, wanted to apologize to the deputy." Appellant stated that he shot "in the general area toward the deputy, but he again stated that he didn't mean to hurt the deputy." Appellant never said that he deliberately fired in the air or away from the deputy. Appellant further stated that when he crashed the sedan, he ran away because it was a stolen car but the deputy chased him.

Deputy Kennedy testified that appellant also described the foot chase. As appellant ran from the stolen car, he tried to remove a .25-caliber handgun from a holster in his left waistband but it was difficult because the gun was backwards in the holster and it was stupid thing to do. Appellant did not state that he was trying to discard the weapon. Appellant said that when he reached for his weapon, the deputy pulled his handgun and told him to stop. Appellant clearly knew that a law enforcement officer was chasing him. Appellant finally removed the gun from the holster, ran around the side of a building and waited. Appellant did not clarify what he was waiting for. Appellant stated the deputy ran around the corner and fired at him three times. Appellant claimed he fired back in the general direction of the deputy, and the deputy fired at him three more times and reloaded his weapon. Appellant repeatedly claimed that he wasn't trying to hurt the deputy, but admitted he fired in the deputy's general direction.

Deputy Kennedy testified that appellant said he ran toward a pickup truck, and tried to jump into the passenger side and run through the cab, in order to escape as the

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[5] At trial, appellant's counsel stipulated that appellant was "properly Mirandized."

deputy continued to follow him. Appellant stated that as he tried to jump into the passenger side of the truck, he "accidentally fired a shot into the ground, and then a man fell to the ground saying that he had been shot." Appellant became scared and didn't know what to do, and decided to give up. He put down his gun, raised his arms, and laid on the ground. Appellant claimed he fired his gun only two times.

Deputy Kennedy testified his conversation with appellant started in the ambulance and ended in the trauma room at University Medical Center. Appellant answered his questions in a rational and coherent manner. He did not want to answer any questions about what he was waiting for when he ran around the corner of the building. Appellant did not display any symptoms of being intoxicated or under the influence of anything, and did not state that he had consumed anything to leave him intoxicated.

When they reached the hospital, Deputy Kennedy remained in the trauma room and observed that appellant suffered two gunshot wounds in each buttock, and there was a small amount of blood. Appellant told Deputy Kennedy that he didn't realize he was shot until he walked to the ambulance.

Appellant was transported to University Medical Center and treated by Dr. Yen-Chung Andrew Lee at some point after 12:30 a.m. Dr. Lee conducted a complete physical examination and found appellant suffered two gunshot wounds in each buttock. The gunshot holes were in a linear pattern and consistent with being inflicted by one bullet, entering from one side of appellant's body and exiting through the other side. The bullet grazed the gluteus muscles and went into the subcutaneous tissues, and passed through the buttocks. A CT scan was performed and revealed no injury to appellant's pelvic organs.

Dr. Lee testified appellant's wounds were "mild," and he did not suffer any sensory or motor defects. He suffered a slight loss of blood and there was no need for surgery. Dr. Lee described appellant as mildly stressed, but he was alert and there were no signs of shock. Appellant was oriented and very coherent, spoke normally, and gave

rational responses. Appellant displayed some tenderness in his right forearm, which he indicated was from a previous injury, but he was able to move his right fingers and arm. Appellant was given pain medication and instructed to return to the outpatient clinic for a follow-up examination, and he was released to the police officers.

After appellant was released from the hospital, he was transported to the police department and interviewed by Detective Al Murrietta shortly before 6:00 a.m. Detective Murrietta testified that he did not readvise appellant of the *Miranda* warnings because he knew appellant had been previously advised and waived his rights. However, Detective Murrietta asked appellant if he wanted his rights read to him again, and appellant declined the offer. Detective Murrietta testified appellant was willing to speak about the incident, and was very forthcoming and cooperative.

Detective Murrietta testified appellant never gave any indication of being intoxicated or under the influence of any substance during the interview. He did not say that he recently ingested any intoxicating substance, and did not complain about any disability which would impair his ability to respond to questions. Detective Murrietta did not see any evidence that appellant was coming out of a period of intoxication, or suffering withdrawal symptoms from a controlled substance or alcohol.

Detective Murrietta was joined by Detective Danny Martin as they conducted the interview. The interview was tape-recorded, and the tape and a transcript was introduced into evidence. According to the transcript, Detective Murrietta asked appellant if an officer already read his rights. Appellant replied that an officer already read the rights, and he understood them. Murrietta asked if he needed to repeat the rights, and appellant replied no. Appellant stated that he came to Fresno about two months ago because his family lived in motels near Parkway Drive. He described himself as homeless.

Detective Murrietta asked appellant to describe the events of that night.

> "Yeah, what happened is, a high speed chase in a stolen vehicle that I didn't steal, I found. But, you know, I might as well say I stole it cuz I

> got in and drove off with it. I was going down a back street, ended up into a high speed chase. I lost control of the car and jumped out and tried running. Officer came from behind and he told me to freeze, and I panicked. I had a little .25. I didn't shoot directly at the police officer, I shot away from him, but I still shot at him. He shot back. He unloaded and he shot me in the ass. That's what happened, and I got arrested. Oh, I tried to run, but (inaudible). I got caught."

Appellant insisted that he was not trying to shoot the officers, and he thought the officer fired first. "I don't remember. It . . . it all happened so … fast . . . I was just scared."

As the interview continued, appellant insisted the deputy fired at him first, and he never meant to shoot at Mr. Mulholland:

> "I stopped. I was just standing there and [the deputy] started shooting at me. And then after, we both shot and then he unloaded his gun. I only had like two shots. I shot one time away from him, and the last shell … it just went off when I was running. When I was getting . . . there was a guy in the truck. I tried to go . . . climb through his truck to get out the other side and keep running, and that when it went off. It went off inside his truck. It didn't hit him. It just . . . the gun just went off."

Appellant said he just had two shells in his gun.

Detective Murrietta asked appellant about the stolen vehicle. Appellant said he found two stolen cars in the parking lot of the Fresno Inn, located at Clinton and Highway 99, where his relatives were staying. Appellant knew both cars were stolen because the steering columns were "peeled." Appellant took the sedan and was driving to his cousin's house when the deputy started to follow him.

Detective Murrietta asked about the car chase, and appellant said he was just trying to get out of the car. He admitted that he ran from the officer, then tried to climb through Mr. Mulholland's truck.

> "I wasn't trying to take . . . no, I wasn't trying to take his truck. I'm just trying to get through it so I can get to the fence on the other side, cuz he was parked right there. I was gonna try and jump the fence . . . but he was right there. I tried to climb in and he fell out, and the truck was still rolling. I was stuck inside the truck and it hit a fence, and then I got out of it. And that's when I just put my hands up, threw the gun, and laid down."

Appellant stated he held the gun in his left hand when he fired. He had previously suffered an injury to his right hand. Appellant obtained the gun and the holster at an auction in Sunnyside.

Detective Murrietta asked why he jumped out of the truck. Appellant replied the truck kept rolling and hit the fence, and he jumped out because he didn't want to get killed. "I mean, the cops sat there and unloaded on me. Lucky I only got hit once in the ass."

Appellant repeatedly stated that he "wasn't trying to hurt nobody," and described the shooting as occurring "out of panic, and a dumb-ass choice." Appellant described his bullet wound as "straight there . . . cheek to cheek, straight through." Appellant also said he had a big bump on his head, which he believed was also from a bullet wound. However, he admitted that he might have bumped his head when he crashed the stolen car.

Detective Murrietta testified that appellant never said he fired the second round into the ground. He did not specifically describe the number of rounds fired between them. He never said that he ran around the corner of the building and waited for the deputy. He never said he was trying to throw the gun away from him. Appellant was very straightforward and very open.

Additional trial evidence

There were three individuals in the area of the shooting who heard the gunshots. Lonnie Clauser lived near the intersection of Princeton and Marks, next to the scene where appellant was apprehended. He was awakened by the sound of gunshots, and heard three to five shots. He thought all the shots sounded loud.

Peter Cruz was working as a security guard at an apartment complex near the intersection of Princeton and Mark when he heard a loud thud, as if a car crashed into something. The loud thud was closely followed by several loud gunshots, which were

fired without a noticeable pause. Cruz didn't see anyone but decided to call 911 because the gunshots sounded close to his position.

Stephen Chin was working at his restaurant, near the intersection of Marks and Clinton, when he also heard gunshots in the area. He heard five to six shots which made different sounds. "One was louder than the other." "One more like a pop-gun going off and one quite a bit louder than the other." He heard two or three pop-gun shots, and maybe two or three louder shots. He looked outside and observed several police cars traveling northbound on Marks, in the direction where he heard the shots fired. Chin acknowledged that he spoke to a police officer that night, and stated that he heard the louder shots fired before the pop-gun shots.

A criminalist examined appellant's pants and testified there were two bullet holes in the rear of pants. The criminalist determined the bullet's entrance point was on the left side of appellant's buttocks. The bullet passed through his buttocks and exited through his right side. The bullet also passed through the rear shirt tail of appellant's shirt.

Detective Brad Alcorn testified the investigative team never found any .25-caliber casings in the area. Detective Alcorn believed the .25-caliber casings were small enough that they could have been trampled in the course of the pursuit, either by the officers who were chasing appellant on foot, or by one of the squad cars that arrived as Deputy Kilner's backup assistance. Detective Alcorn was unable to find any .25-caliber casings in Mr. Mulholland's truck. He later realized there was a bullet hole through the roof of the cab which indicated the bullet passed through the vehicle. Detective Alcorn conceded it was possible for appellant's gun to have accidentally discharged as he grasped the weapon and tried to climb into the truck.

Deputy Kilner testified that he had several opportunities to fire his weapon at appellant earlier in the chase, but he had no reason to shoot until appellant fired at him. Deputy Kilner didn't know appellant was armed until appellant turned and fired at him.

Deputy Kilner testified he had been a police officer for less than a year and was still a rookie. This incident was the first time he had participated in the apprehension of a moving stolen vehicle. He had never fired his weapon before this incident. Deputy Kilner did not file a written report about the incident. Instead, he gave a statement to Detective Murrietta about the events of that night.

Officer Andriese testified that he spoke with Deputy Kilner after appellant was apprehended, and described Kilner as shaken but rational. Officer Fief described Deputy Kilner as surprisingly calm considering the events of the evening. Officer Greg Collins also spoke with Kilner that night, and described him as stressed and shaken from the incident. However, Collins believed Kilner's reaction was not unusual based on what he experienced.

Detective Murrietta interviewed Deputy Kilner at the police department that night. He did not advise Kilner of the *Miranda* warnings, but Kilner's attorney was present during the entire interview, pursuant to the peace officer's "bill of rights." Deputy Kilner stated that he was fired at first and then he returned fire. Kilner believed he was fired at because he heard a pop and saw a flash. In the course of the interview, Kilner said he saw both a single "flash" and multiple "flashes," to describe his encounter with appellant. Kilner didn't realize appellant had a gun until he heard the pop. Deputy Kilner was very alert and articulate about details, and Detective Murrietta was impressed with his demeanor as a rookie officer. However, Kilner did not say anything about additional shots being fired as they ran around the corner of the building.

Defense evidence

Harold Ball testified his family owned the automobile sales lot at the intersection of Princeton and Marks, and he lived on the premises. Around midnight, he heard the sound of an accelerating vehicle. He looked outside and saw a vehicle spin out and crash into a building. He then saw the patrol car follow the crashed vehicle. Ball testified a man ran from the crashed vehicle, and the man extended his arm in the opposite direction

and fired a gun. The man didn't aim the gun, and wasn't looking when he fired. "To me it seemed like he got shot in the ass and shoot [*sic*] at the same time." Ball testified he heard the sound of large caliber shots being fired before he heard the smaller caliber shots. Ball heard other shots fired but he didn't see the exchange. Ball lost sight of the man until the pickup truck crashed into the fence. The man tried to jump over the fence into the auto lot, but he stopped when he heard Ball's dogs barking at him.

David Henson, appellant's cousin, testified that he spent time with appellant on November 9, 10, and 11, 1999, just before the car chase and his arrest. Henson testified that he observed appellant ingest methamphetamine and smoke marijuana, and "we were up for like three days." Henson believed appellant used about 1.7 grams of methamphetamine in that period. Henson admitted it was hard for him to clearly remember things because of his own regular drug use. However, Henson was sure that appellant used methamphetamine on the evening of November 11, just hours before the car chase. When appellant parted from Henson that night, he was in a good mood, he was acting and speaking normally, and there was nothing unusual about his behavior.

Deputy Todd Cotta testified he interviewed Stephen Chin on the night of the incident about his observations. Mr. Chin stated that he heard about five to six big gunshots fired. Mr. Chin further stated that immediately after the first shots, he heard two to three small gunshots.

Rebuttal

Detective Murrietta testified that on the night of the incident, one of the investigators from the district attorney's office informed him that Harold Ball was a possible witness to the car chase and shooting. The next day, Detective Murrietta contacted Ball at the automobile lot where he was living. Murrietta testified that Ball was not eager to speak with him, and Murrietta "actually had to solicit a statement" from Ball.

Detective Murrietta stated that Ball said he saw part of the pursuit but lost sight of the vehicles. He heard the screeching tires and subsequent crash of a vehicle. Ball

started to run toward the area and heard gunshots. He still could not see the area and remained behind another building for his own safety because of the gunshots. Ball stated that he never saw who was doing the shooting. He thought he heard three weapons being discharged: one small caliber and two other larger caliber weapons. Ball believed he heard five to ten rounds being fired, but he never said anything about distinguishing the bursts of fire. By the time Ball arrived at the scene, he saw Mr. Mulholland's truck crash into the fence and appellant crawl of the vehicle. He thought appellant was about to climb the fence into his automobile lot, and warned him that there were dogs on the property. Ball stated appellant ran toward the street and surrendered to the officers.

Detective Murrietta testified that Ball said he couldn't tell who was firing the weapons, and he didn't see the officers do anything wrong when they apprehended the suspect. He never said that his presence at the scene prevented the officers from killing appellant. Murrietta characterized Ball as being "somewhat of a reluctant witness. And he was quickly going through trying to give me a statement to -- so I would get out of his face." Ball didn't really care to get involved. Murrietta knew Ball was on parole when he spoke with him, but he never used that information to motivate Ball to cooperate with him. He never tried to stop Ball from giving a statement or told him to shut up.

Issues on appeal

Appellant was found not guilty of count I, attempted murder of Deputy Kilner, but guilty of the lesser offense of attempted voluntary manslaughter of Deputy Kilner, and that he knew the victim was a peace officer engaged in the performance of his duties. Appellant was also found guilty of count II, assault with a firearm upon a peace officer, Deputy Kilner; count III, attempted kidnapping of Mr. Mulholland; count IV, carjacking of Mr. Mulholland; and count V, unlawfully taking or driving Mr. Speechly's vehicle.

As to counts I and II (Deputy Kilner), the jury found appellant personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally used a firearm (§ 12022.53, subd. (b); § 12022.5, subd. (a)(1)). As to counts III and IV (Mr.

Mulholland), the jury only found appellant personally used a firearm (§ 12022.53, subd. (b)), but that he did not personally and intentionally discharge a firearm (§ 12022.53, subd. (c)).

The court found the prior conviction allegations to be true, and that appellant's prior burglary convictions in Illinois were serious felonies under California law. The court sentenced appellant to a determinate term of 36 years, with a consecutive, indeterminate third strike term of 54 years to life in prison.

On appeal, appellant contends the trial court erroneously denied his motion to exclude his pretrial statements. Appellant asserts his statements in the ambulance were not voluntary and obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436, and his subsequent statements to Detective Murrietta were tainted by the voluntariness and *Miranda* violations.

Appellant contends the trial court improperly allowed Deputy Kilner to sit at the prosecution table as the investigative officer because he was the victim of these charges and he did not file a report about the incident. Appellant also challenges the prosecution's cross-examination of Harold Ball as to his prior convictions and his custody status at the time of trial.

Appellant challenges the imposition of the third strike terms. He contends his prior burglary convictions in Illinois are not serious felonies in California based on distinctions between the statutes. He also contends his sentence constitutes cruel and/or unusual punishment in violation of the state and federal Constitutions.

DISCUSSION

I.

APPELLANT'S PRETRIAL STATEMENTS WERE PROPERLY ADMITTED

Appellant contends the trial court should have excluded his pretrial statements as being involuntary and obtained in violation of *Miranda*. Appellant contends Deputy Kennedy improperly spoke with him in the ambulance prior to giving the *Miranda*

warnings, and his statements were involuntary because he was suffering from the effects of the car chase, crash, and gunshot wounds. He also contends Detective Murrietta should have readvised him of the *Miranda* warnings during his subsequent interview, and his statements to Murrietta also should be suppressed because they are tainted by his prior, involuntary statements.

A. Background.

On the first day of trial, appellant moved in limine to exclude his pretrial statements. He requested an evidentiary hearing to determine if his statements were obtained in violation of *Miranda* and his right to counsel, and whether his statements were not voluntary because he was in shock after being shot during the pursuit. In response, the prosecutor summarized the police reports about the nature and circumstances of appellant's statements. The court stated that it appeared appellant made spontaneous statements and thereafter waived his *Miranda* rights. However, the court invited appellant to request an evidentiary hearing to further address the issue. Appellant renewed his request and the prosecution presented the testimony of three witnesses.

Paramedic Clark Sumner testified that he responded to the scene on the dispatch of a shooting. At approximately 12:16 a.m., an officer directed him to make contact with appellant. Appellant was in handcuffs and his pants were very dirty as if he had been in a fight. Sumner asked appellant if he was injured, and appellant replied he wasn't sure but his buttocks hurt. Appellant thought he injured himself because he fell down. Sumner inspected appellant's pants and noticed blood on the rear pockets.

Sumner instructed appellant to enter the ambulance in order to remove his pants to determine if he was injured. Appellant was escorted by Deputy Kennedy as they entered the ambulance. Appellant lowered his pants and Sumner determined appellant "had a hole on either side of the buttocks." Sumner told appellant he'd been shot and asked who did it. Sumner testified that Deputy Kennedy replied appellant had been shot by another

officer. Sumner testified about his further conversation with appellant and Deputy Kennedy in the ambulance.

> "[THE PROSECUTOR] . . . Were you ever particularly aware of a conversation [appellant] was having with the officer who went with you and [appellant] to the hospital?
>
> "[WITNESS] Yes. At the point I found out it was an officer-shooting and I guess there was a car chase and a car pull-over, and I'm gathering all this when [Deputy Kennedy] was in the back of the ambulance. And I 'said [*sic*], Now so you did get shot, you were chased and shot and fell down and handcuffed? So are you injured anywhere else?' And then I started looking around more on his body. And then the officer said yes, it was a -- the officer who was in the back with me, he let me in a little on what was going on, it was a car chase.
>
> "Q Okay.
>
> "A I said, 'Wow.' And there was talk amongst the three of us with, 'Well, you shot at the officer. You know, he has a family. You know. Don't you think he has a family?' And he says, 'I know.' [Appellant] said, 'I -- I shouldn't have done that. I was scared.' And I said, 'My family is afraid when I'm out working as a paramedic' And so there was talk about that.
>
> "And then -- then I do remember that the officer said, 'Well, you know you're talking to us now about things; but I need you to know' -- and he did -- he did explain to him, 'You're being taken to the hospital.' He gave him -- I know the Miranda rights -- he gave him Miranda rights. And it was interesting that [appellant] said -- the officer asked, 'Are you aware of your rights?' And he says, 'Oh, yeah. And I can read them by heart,' or, 'I know them by memory. And I just got out of jail. And we talked a little bit about, 'well, if you're just out of jail, that's not a good thing to be happening to have all this going on.'
>
> "And the officer did explain all of the Miranda warnings or rights as I know them.
>
> "Q Okay.
>
> "A 'You can be quiet. You're talking to us now, but you know you can be quiet.' And he said he was sorry and, you know -- and he was scared, and he did something dumb, and he shouldn't have."

Sumner testified that about three minutes passed from the time when he learned about the officer-involved shooting to when Deputy Kennedy advised appellant of the *Miranda* warnings.

Sumner testified appellant had minimal bleeding from his wounds and was not in acute distress or shock. Sumner explained that he had been trained as a paramedic to recognize the symptoms of shock, and treated thousands of patients who were in shock. Sumner testified that he took appellant's vital signs at 12:24 a.m., and his vital signs did not indicate shock. "His blood pressure was fine. His pulse rate was a little elevated, but I would imagine all of ours would be at that time." An individual in shock would exhibit decreased mental status, signs of pale skin, and clammy, elevated, and increased and decreased blood pressure. "And I didn't find any of those." The wounds were not life threatening and were limited to soft tissue injuries. Sumner described appellant as alert, calm, helpful, and even apologetic as he was being treated. Sumner started an intravenous line to administer fluids to appellant, but did not administer any medication.

Deputy Michael Kennedy testified that he took custody of appellant from two other deputies at the scene at approximately 12:20 a.m., and escorted appellant to the ambulance. Appellant "was talking a lot. Complaining of -- as we walked closer to the ambulance, he started complaining of pain coming from his buttocks." Deputy Kennedy entered the ambulance with appellant and Paramedic Sumner examined him. Deputy Kennedy testified that appellant started talking about the incident.

> "[THE PROSECUTOR] . . . Now initially did he speak in response to questions or just apparently speak of his own volition?
>
> "[WITNESS] It was just spontaneous statement.
>
> "Q What did he say initially that you are describing as spontaneous?
>
> "A He was apologizing for shooting at the deputy. He was talking about the possibility of him having a family and he was sorry because of that, and that he also had a family, that he was scared, he didn't know what to do. And I can't recall what else he said."

Deputy Kennedy testified appellant made these spontaneous statements "right before he stepped into the ambulance and after he was laying down, being examined by the paramedic."

> "[DEFENSE COUNSEL] Okay. Before he made this spontaneous statement did you make any statements to [appellant]?
>
> "[WITNESS] No.
>
> "Q You were completely silent?
>
> "A Uh, no, I don't believe I was completely silent. I was -- if I recall, I was giving him directions to the ambulance. But he was making these comments and statements when I took possession of him from the other two deputies."

Deputy Kennedy testified that after appellant made his initial, spontaneous statements, he advised appellant of the *Miranda* warnings. He believed the advisement occurred when the ambulance "just left the scene en route to the hospital." Deputy Kennedy asked appellant if he had ever been advised of the *Miranda* warnings, and appellant replied he had. Deputy Kennedy then proceeded to advise him that he had the right to remain silent and asked if he understood. Appellant replied he did. Deputy Kennedy advised appellant that anything he said could be used against him in court, and appellant again said he understood. As Deputy Kennedy advised appellant of his right to counsel, appellant "started repeating them with me." Deputy Kennedy had to stop appellant because he kept talking as Kennedy read the advisements. Appellant said he understood his right to counsel. Deputy Kennedy informed appellant that an attorney would be appointed to represent him if he could not afford one. Appellant again stated he understood his rights "and started into a statement." Appellant proceeded to give a statement to Deputy Kennedy.

Deputy Kennedy testified that throughout his contact with appellant in the ambulance, he was alert and rational, and voluntarily discussed the incident. Deputy Kennedy had been in the presence of people who were in shock, and recited the

symptoms as having a "[b]lank stare, pale, dizzy, confused speech." Deputy Kennedy never observed appellant display any of these symptoms, and he never lost consciousness or nodded off. "He was in pain. I don't think it was unbearable, but he was in pain." Even though he appeared to be in pain, his behavior was rational and he gave rational responses to questions. Appellant never said or did anything to indicate that he wanted to stop talking to Deputy Kennedy. Deputy Kennedy noticed the paramedic started an intravenous line on appellant, but he didn't know if any medication was administered.

Detective Al Murrietta testified that at approximately 5:30 a.m. that same day, he contacted appellant in an interview room at police headquarters. Appellant had been treated and released from the hospital. Detective Murrietta introduced himself and advised appellant about the investigation, and stated he would like to obtain a statement from him. Detective Murrietta testified that appellant was very cooperative and agreed to give a statement. Detective Murrietta asked appellant about his physical status. Appellant replied he had been treated and released from the hospital, and he was "okay." Appellant did not exhibit anything in his statements or demeanor to indicate that he was under the influence of any substance or medication. Detective Murrietta asked if he was suffering any effects from the events of the evening or the medical treatment, or whether any medication affected his mental capabilities to answer questions. Appellant again replied no, he was okay, and he was very cooperative and willing to speak with the officer.

Detective Murrietta testified that appellant indicated he was tired, but his speech was normal and not slurred. He did not nod off, his answers were appropriate and understandable, and he did not indicate that he was in pain. Appellant's statement was very specific about the incident that evening, and he claimed the officer fired at him first.

Detective Murrietta told appellant that he was aware of the previous advisement of the *Miranda* warnings. Appellant acknowledged he had previously been advised of his rights. Murrietta asked if he wanted the advisement repeated, and appellant replied no.

Murrietta advised appellant that his statement would be tape-recorded, and placed the tape recorder on the table in front of appellant. Appellant did not object, and willingly gave a statement while the recorder was on.

Detective Murrietta testified appellant never requested an attorney, refused to answer any questions, or tried to end the interview. He never invoked his *Miranda* rights or indicated that he didn't want to cooperate. Murrietta had no difficulty understanding appellant's responses. The interview ended at 6:16 a.m.

On cross-examination, Detective Murrietta conceded the transcript of the tape-recorded interview did not reflect his preliminary questions about appellant's physical condition and his ability to answer questions. Murrietta explained that he asked these preliminary questions before he turned on the tape recorder. Detective Murrietta had previously dealt with individuals who suffered gunshot wounds and went into shock, and he did not observe appellant display any symptoms consistent with shock. He didn't observe any indication that appellant's mental status was affected from any medication he might have been given at the hospital.

The evidentiary hearing was limited to these three prosecution witnesses, and appellant did not present any evidence or offer further argument. The trial court considered the testimony and held that, based upon the totality of the circumstances, the evidence established by a preponderance of the evidence and "beyond a reasonable doubt" that appellant "voluntarily, intelligently, and knowingly" waived his *Miranda* rights. The court did not expressly address whether appellant's pre-*Miranda* statements were spontaneous and voluntarily, but appellant did not request a ruling on this issue.

Later in the trial, appellant requested the court to exclude portions of his pretrial statements, where he mentioned that he ran from the officer because he had previously been in jail and was wanted in another state. The court found the probative value of these statements was outweighed by their prejudicial effect, and excluded such excerpts

pursuant to Evidence Code section 352. However, the court reserved the right to reconsider its ruling if appellant testified and claimed he had no reason to run away.

Appellant also raised hearsay objections to the prosecution's request to introduce the transcript of his interview with Detective Murrietta. The court rejected appellant's hearsay objections and allowed the transcript into evidence. Appellant also objected to the tape-recorded statement because he was unable to cross-examine Detective Murrietta. However, the court advised appellant that he could subpoena Murrietta for cross-examination.

Appellant's pre-*Miranda* statements were subsequently admitted into evidence at trial without further objection. The court did not exclude any part of appellant's pretrial statements. At trial, appellant's counsel stipulated that appellant was "properly Mirandized."

On appeal, appellant contends his statements in the ambulance were involuntary and he was subject to the functional equivalent of interrogation prior to receiving the *Miranda* warnings. Appellant further contends his statements to Detective Murrietta should be suppressed because of the alleged prior illegality, and for Murrietta's failure to readvise him of the *Miranda* warnings.[6]

B. Appellant's pre-*Miranda* statements in the ambulance

First, appellant contends his pre-*Miranda* statements were not voluntary and spontaneous, but instead the result of the functional equivalent of interrogation based on the nature of the conversation between Deputy Kennedy and Paramedic Sumner. Appellant asserts he was isolated and suffering the effects of the car crash and the

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6 As a preliminary matter, appellant also asserts that his motion in limine to exclude his pretrial statements was sufficient to preserve his *Miranda* and voluntariness contentions for purposes of appeal. Respondent concedes appellant preserved review of these issues, and we need not address this argument.

gunshot wounds when subject to Kennedy's use of trickery to induce a statement from him.

"Under the familiar requirements of *Miranda*, designed to assure protection of the federal Constitution's Fifth Amendment privilege against self-incrimination under 'inherently coercive' circumstances, a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent." (*People v. Sims* (1993) 5 Cal.4th 405, 440, citing *Miranda v. Arizona, supra*, 384 U.S. at pp. 444-445, 473-474.) Once having invoked these rights, the accused is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. (*People v. Sims, supra*, 5 Cal.4th at p. 440.) "Even if the suspect initially waives these rights and responds to interrogation, he may reinvoke them at any time. If he does so 'in any manner and at any stage of the process,' his request to terminate the questioning or obtain counsel must be 'scrupulously honored.' [Citation.]" (*People v. Boyer* (1989) 48 Cal.3d 247, 271, quoting *Miranda v. Arizona, supra*, 384 U.S. at pp. 444-445, 473-474, 479.)

The advisement of *Miranda* rights, however, is only required when a person is subject to custodial interrogation. (*People v. Mickey* (1991) 54 Cal.3d 612, 648; *People v. Mosley* (1999) 73 Cal.App.4th 1081, 1088.) Custodial interrogation has two components. First, it requires that the person being questioned be in custody. The second component is obviously interrogation. (*People v. Mickey, supra*, 54 Cal.3d at p. 648.) The phrase "'custodial interrogation'" is crucial. "Absent 'custodial interrogation,' *Miranda* simply does not come into play." (*Ibid.*)

In *Rhode Island v. Innis* (1980) 446 U.S. 291, the United States Supreme Court clarified that *Miranda* rights only come into play when a suspect in custody is subjected to either express questioning or its "functional equivalent," i.e., by words or actions on

the part of police that they should know are "reasonably likely to elicit an incriminating response from the suspect." (*Id.* at p. 301.)

> "That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." (*Rhode Island v. Innis, supra,* 446 U.S. at pp. 301-302, fns. omitted, italics omitted.)

California courts have characterized this definition as a two-pronged inquiry: (1) whether the officer's remark or action was the type reasonably likely to elicit an incriminating response; and (2) even if the officer did not intend to elicit such response, whether that officer should have known the action or remark was likely to do so. (*People v. Mobley* (1999) 72 Cal.App.4th 761, 792; *People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 241-242; *People v. Claxton* (1982) 129 Cal.App.3d 638, 653-654.)

Thus, the police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response. (*People v. Cunningham* (2001) 25 Cal.4th 926, 993; *People v. Clark* (1993) 5 Cal.4th 950, 985; *U.S. v. Foster* (9th Cir. 2000) 227 F.3d 1096, 1101-1104.) In addition, spontaneous statements are not the product of interrogation and therefore are not violative of *Miranda*. (*People v. Mickey, supra*, 54 Cal.3d at p. 648; *People v. Mobley, supra,* 72 Cal.App.4th at p. 792.)

As a separate and related principle, the use in a criminal prosecution of a confession, admission, or statement which is obtained by force, fear, or promise of immunity or reward is a denial of the state and federal constitutional guarantees of due process of law. (*Malloy v. Hogan* (1964) 378 U.S. 1, 7; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1483.) A confession is considered voluntary if the defendant's decision to speak is entirely self-motivated, "if he freely and voluntarily chooses to speak without 'any form of compulsion or promise of reward.…'" (*People v. Thompson* (1980) 27 Cal.3d 303, 327-328; *People v. Boyde* (1988) 46 Cal.3d 212, 238.) If, however, the confession was elicited by any threats or promises of leniency or advantage, express or implied, or by the exertion of any improper influence, the confession is deemed involuntary and inadmissible as a matter of law. (*People v. Clark, supra*, 5 Cal.4th at p. 988; *People v. Benson* (1990) 52 Cal.3d 754, 778; *People v. Boyde, supra*, 46 Cal.3d at p. 238; *People v. Spears* (1991) 228 Cal.App.3d 1, 27.)

Similarly, a statement obtained by psychological coercion is also involuntary. (*People v. Clark, supra*, 5 Cal.4th at p. 989; *People v. Esqueda, supra*, 17 Cal.App.4th at p. 1483.) The question raised by the due process clause in cases of claimed psychological coercion "is whether the influences brought to bear upon the accused were 'such as to overbear [the defendant's] will to resist and bring about [statements or admissions] not freely self-determined.' [Citation.]" (*People v. Hogan* (1982) 31 Cal.3d 815, 841.) "What the Constitution permits to be admitted in evidence is 'the product of an essentially free and unconstrained choice . . .' to confess. [Citations.] The question is whether defendant's choice to confess was not 'essentially free' because his will was overborne. [Citation.] The inquiry is essentially factual." (*People v. Memro* (1995) 11 Cal.4th 786, 827.)

A defendant's admission or confession challenged as involuntary may not be introduced into evidence at trial unless the prosecution proves by a preponderance of the evidence that it was voluntary. (*Lego v. Twomey* (1972) 404 U.S. 477, 489; *People v.*

Williams (1997) 16 Cal.4th 635, 659.) On appeal, we review independently the trial court's determination on the ultimate legal issue of voluntariness. (*People v. Williams, supra,* 16 Cal.4th at pp. 659-660; *People v. Benson, supra,* 52 Cal.3d at p. 779.) But any factual findings by the trial court as to the circumstances surrounding an admission or confession, including the characteristics of the accused and the details of the interrogation, are subject to review under the deferential substantial evidence standard. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *People v. Williams, supra,* 16 Cal.4th at p. 660; *People v. Benson, supra,* 52 Cal.3d at p. 779.)

In deciding the question of voluntariness, we must consider the totality of the circumstances. (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694; *People v. Williams, supra,* 16 Cal.4th at p. 660; *People v. Bradford* (1997) 14 Cal.4th 1005, 1041.) Relevant are "the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health." (*Withrow v. Williams, supra*, 507 U.S. at p. 693; *People v. Williams, supra*, 16 Cal.4th at p. 660.) When considering the characteristics of the accused, we look to his age, sophistication, prior experience with the criminal justice system, and emotional state. (*People v. Spears, supra,* 228 Cal.App.3d at pp. 27-28; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 209.) However, the Fifth Amendment is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion. (*Oregon v. Elstad* (1985) 470 U.S. 298, 304-305; *People v. Bradford, supra,* 14 Cal.4th at p. 1041.) While the defendant's mental condition is surely relevant to his susceptibility to police coercion, mere examination of the defendant's state of mind can never conclude the due process inquiry. (*People v. Bradford, supra,* 14 Cal.4th at p. 1045.)

In the instant case, there is no dispute that appellant was in custody at the time he made the statements in the ambulance. After the lengthy pursuit, he had been arrested at gunpoint and placed in handcuffs. Deputy Kilner held him in custody until he was

escorted to the ambulance by Deputy Kennedy. Deputy Kennedy entered the ambulance with him in order to maintain his custodial status, and released his handcuffs simply to assist the paramedic's examination. There is also no dispute that neither Deputy Kennedy nor any other law enforcement officer directly interrogated appellant at the scene after he was placed in custody.

Instead, appellant contends he was subject to the functional equivalent of interrogation based on the nature of the conversation in the ambulance between Paramedic Sumner and Deputy Kennedy. However, the entirety of the record reflects appellant spontaneously made his initial statements about the car chase and shooting, and his statements were not elicited as the result of the functional equivalent of interrogation. Paramedic Sumner conducted the physical examination to determine if appellant was injured, discovered the gunshot wounds, and inquired who shot him. Deputy Kennedy simply replied that appellant was shot by an officer. Sumner continued the examination and asked if appellant suffered any other injuries, and he learned about the car chase from Deputy Kennedy. Sumner was obviously surprised and shaken to learn that an officer had been fired upon, and expressed his concern for the officer's family. Thereafter, appellant initiated his spontaneous statements and apologies for having fired upon the officer. Sumner testified that Deputy Kennedy immediately advised appellant of the *Miranda* warnings because "'you know you're talking to us now about things.'"

In *People v. Mobley, supra*, 72 Cal.App.4th 761, defendant was arrested and advised of the *Miranda* warnings, and asked to see an attorney. As defendant was being driven to the jail, an officer spoke with defendant "in a conversational manner" and "engaged only in small talk 'to lighten things up'" during the trip. (*Id.* at pp. 790-791.) At some point after the officer's casual conversation, defendant made "unsolicited spontaneous statements" about the charged offense. (*Id*. at p. 790.) Mobley held the officer's "attempt at casual conversation with [defendant] during transport to the jail was

neither direct interrogation nor its functional equivalent that was likely to elicit an incriminating response." (*Id.* at p. 792.)

There is nothing in the exchange between Kennedy and Sumner that could be considered the functional equivalent of interrogation. Sumner was trying to determine if appellant suffered any injuries. Once he discovered the gunshot wounds, he endeavored to determine if appellant suffered any other injuries and wanted to know what happened. Deputy Kennedy's responses to Sumner were limited to giving a factual account of the incident. There is no evidence that Kennedy attempted to elicit a response from appellant by dramatizing or misrepresenting the sequence of events. There is no evidence that Kennedy condemned appellant's conduct or otherwise tried to provoke him into defending himself or his conduct. (*People v. O'Sullivan, supra,* 217 Cal.App.3d at p. 243; see also *People v. Bradford, supra,* 14 Cal.4th at pp. 1034-1035 [defendant's initial statements, made after casual remark by detective and without questioning by officers, were volunteered, but subsequent questions by officers about details of the crime constituted custodial interrogation].)

Appellant asserts that he was interrogated by Deputy Kennedy *and* Paramedic Sumner, and they jointly used the "tactic of assuming he committed an assault on a peace officer, and they did so in a kindly way. Sumner, in fact, cared for appellant's wounds." Implicit in appellant's argument is that Paramedic Sumner acted as an agent of law enforcement in treating his injuries.

Miranda and its progeny govern law enforcement officials, their agents, and agents of the court, while the suspect is in official custody. (*In re Deborah C.* (1981) 30 Cal.3d 125, 130.) "'A private citizen is not required to advise another individual of his rights before questioning him. Absent evidence of complicity on the part of law enforcement officials, the admissions or statements of a defendant to a private citizen infringe no constitutional guarantees.' [Citations.]" (*In re Eric J.* (1979) 25 Cal.3d 522, 527; *People v. Whitt* (1984) 36 Cal.3d 724, 745.) However, a doctor interviewing a

defendant to secure evidence on behalf of the prosecution may be an agent of law enforcement. (*People v. Sanchez* (1983) 148 Cal.App.3d 62, 70.)

In *People v. Salinas* (1982) 131 Cal.App.3d 925, a police officer responded to an anonymous call reporting a suspected instance of child abuse. When the officer arrived at the residence, he found an unconscious child and immediately called for an ambulance. At the hospital, a doctor questioned the child's mother to obtain a medical history of the child for purposes of diagnosis and treatment. During her trial on charges of felony child abuse, the mother attempted to exclude her statements to the doctor because they were statements made to a police agent absent *Miranda* warnings. *Salinas* found the doctor was not a police agent and, therefore, *Miranda* did not apply because the purpose of the reporting statute was to bring cases of suspected child abuse to the attention of police authorities as early as possible to avoid the potential danger to the child when he or she remains with the abusing parent. *Salinas* noted that in an emergency situation, the interest in securing the child's well-being outweighed the alleged abuser's right against self-incrimination. *Salinas* further held the overriding purpose of obtaining a medical history is to treat the patient, not to enforce the law. (*Id.* at pp. 941-943; *People v. Younghanz* (1984) 156 Cal.App.3d 811, 818.)

There is no evidence that Paramedic Sumner acted as an agent of law enforcement as he treated appellant's injuries, or that his duties obliged him to report any statements to law enforcement officers to assist in the criminal investigation. There is no evidence that Sumner acted in concert with Deputy Kennedy to engage in an exchange designed to elicit an incriminating response from appellant. Sumner testified at the suppression hearing but appellant never raised this issue during cross-examination, or inquired as to any possible overlap between Sumner's duties as a paramedic and his relationship with law enforcement officers. The evidence simply demonstrates that Sumner went about his duties as an emergency medical technician in examining and treating appellant's wounds.

Appellant next contends that he was in shock, and suffering the effects of the car crash and the gunshot wounds, when he was subject to the functional equivalent of interrogation. Appellant thus asserts his statements were involuntary and the result of psychological coercion because he was "isolated" in the ambulance and "in pain, had just been in an accident that 'totaled out' a car, and was being treated, and transported, for a gunshot wound."

A similar claim was made in *People v. Jackson* (1989) 49 Cal.3d 1170, in which an officer was shot and killed after defendant physically resisted being taken into custody. When the officer tried to detain defendant, he violently resisted and managed to take possession of the officer's shotgun from his patrol car. After he shot the officer, he attempted to shoot the backup officers, who released a police dog in an attempt to subdue him. Defendant shot the police dog, but the wounded dog continued to charge and attacked defendant. Defendant dropped the shotgun and was finally taken into custody after another violent physical confrontation with the arresting officers. Defendant was taken to the jail and transferred to the county hospital after not showing signs of verbal responsiveness. A few hours later, defendant showed the first signs of verbal responsiveness and was questioned at that time for identification purposes by the officer who was assigned to guard him. Two detectives later interviewed defendant at the jail hospital. Defendant had been tied down and was extensively bandaged. The detectives advised defendant of the *Miranda* warnings. Defendant agreed to talk and said he didn't want an attorney, and gave a statement. Defendant moved to suppress these statements, and claimed he lacked capacity to waive his rights because of his physical and mental condition after the confrontation with the officers and the dog, and his prior ingestion of drugs. (*Id.* at pp. 1185-1186.)

Jackson rejected defendant's claim that he lacked capacity to waive his rights:

> "The claim of incapacity or incompetence is premised on defendant's physical and mental condition because of the confrontation

> with the officers and police dog and due to the ingestion of drugs. However, there is nothing in the record to indicate that defendant did not understand [the detective]. Defendant's physical circumstances–the fact that he was in restraints and bandaged–apparently did not prevent him from participating in short, lucid interviews (10 or 12 minutes in each instance) during which he attempted to 'cover himself,' indicating (falsely) where he had received his wounds and where he had learned of the killing of the officer. [The detective] testified that defendant's responses seemed normal and that he … did inquire whether defendant had been medicated. The cold record supports a finding of voluntariness.
>
> "Insofar as defendant is claiming that he was incapacitated to waive his rights because of his ingestion of PCP and other drugs, he also cannot prevail. As we stated in *People v. Hendricks* (1987) 43 Cal.3d 584…, '[the] mere fact of voluntary consumption of alcohol does not establish an impairment of capacity,' and here, as in *Hendricks*, the evidence showed that defendant was able to comprehend and answer all the questions that were posed to him. (*Id.* at p. 591.)" (*People v. Jackson*, *supra*, 49 Cal.3d at p. 1189.)

A similar argument was also rejected in *People v. Breaux* (1991) 1 Cal.4th 281. Defendant was arrested after a chase and standoff, in the course of which he was shot in the arm and thigh. Defendant was treated for one hour in the emergency room, and given an injection of morphine to reduce his pain. Thereafter, the officer who accompanied him to the hospital advised him of the *Miranda* rights, and defendant signed a waiver form. Appellant went through another physical examination for 30 minutes, then was interrogated by the officer for about 90 minutes. The medical personnel who treated defendant testified his wounds were not life-threatening and he was in moderate pain. Defendant was coherent, appeared to understand what was said to him, and gave a detailed past history. Defendant told the doctors that he injected heroin that day, but he showed no signs of being under the influence. He was given a small dose of morphine for pain, but it didn't interfere with his ability to later give informed consent for surgery or affect his consciousness. A defense psychiatrist reviewed the medical records and testified that it would have been very difficult for defendant to make a voluntary statement or voluntarily waive his rights, based on his pain and shock from the gunshot

wounds, and his drug abuse. However, the psychiatrist conceded defendant's consent for surgery was knowing, intelligent, and voluntary, and that defendant was well versed in the *Miranda* rights, having exercised them in the prior week when he was arrested. (*Id.* at pp. 299-301.)

Breaux held the trial court properly found defendant's *Miranda* waiver was knowing, intelligent, and voluntary, based on the testimony of the medical personnel who treated him at the hospital. *Breaux* relied on *Jackson* and found there was nothing in the record to indicate defendant did not understand the questions posed to him. (*People v. Breaux*, *supra*, 1 Cal.4th at p. 301.)

As in *Breaux* and *Jackson*, appellant's arguments as to his physical condition are refuted by the record. Paramedic Sumner was familiar with the clinical symptoms of being in shock, and testified that appellant was not in shock. Appellant suffered minimal bleeding, and the wounds were limited to soft tissue injuries and were not life threatening. Sumner described appellant as alert, calm, helpful, and even apologetic as he was being treated. Deputy Kennedy was also familiar with the medical symptoms of being in shock, and testified that appellant did not exhibit any symptoms. Kennedy acknowledged that appellant seemed to be in pain, but appellant was alert and rational, and he never nodded off or lapsed into unconsciousness. At the suppression hearing, appellant failed to present any evidence to rebut the opinions of Sumner and Kennedy as to appellant's physical and emotional condition in the ambulance. We thus conclude there is no evidence that appellant was in shock, or suffering from any physical or psychological impediment to overcome his free will to voluntarily and spontaneously make a statement.

Appellant next challenges the trial court's implicit factual findings as to the credibility of Deputy Kennedy's testimony. Appellant's argument is based on Kennedy's testimony that appellant spontaneously started talking "right before he stepped into the ambulance and after he was laying down, being examined by the paramedic." Appellant

contrasts Kennedy's testimony with Sumner's account that appellant made the spontaneous statements when they were inside the ambulance. Appellant further asserts:

> "Kennedy's misstatements about the location of the so-called spontaneous statements and his extreme assertion he was silent other than to give directions to the ambulance cast serious doubt on his claim that he did not engage in interrogation of appellant. [¶] Thus, Kennedy's claim not to have interrogated appellant is linked to his claim as to the location of appellant's statements, i.e., outside the ambulance. The incredibility of the latter fatally infects the former. Kennedy's testimony 'plainly appears' to be inherently improbable and cannot provide the basis for upholding the trial court's finding of voluntariness."

Appellant thus concludes Deputy Kennedy's testimony was inconsistent and thus undermines the credibility of his account of the exchange in the ambulance.

Appellant's attack upon Deputy Kennedy's credibility is based on the assumption that his testimony was directly contradicted and undermined by Paramedic Sumner's testimony. However, Paramedic Sumner did not come into contact with appellant until after Deputy Kennedy escorted appellant toward the ambulance. There is nothing in Sumner's testimony which would be inconsistent with appellant spontaneously making a statement to Deputy Kennedy *prior to* Sumner's account of his statements in the ambulance.

The entirety of the record thus reflects appellant's initial statements in the ambulance were spontaneous and voluntary. The exchange between Deputy Kennedy and Paramedic Sumner was not the functional equivalent of interrogation, or designed to elicit an incriminating response. There is substantial evidence that appellant's statements were spontaneous and not induced by threats, coercion, or psychological trickery. There is no evidence that Paramedic Sumner acted as an agent of law enforcement or in concert with Deputy Kennedy to coerce appellant into making a statement. We find nothing in this record to indicate that psychological or physical coercion occurred to overcome appellant's free will and render his statements to Deputy Kennedy involuntary. (*People*

v. Memro, supra, 11 Cal.4th at p. 827.) Indeed, appellant's own behavior and statements virtually preclude a conclusion that his free will was overborne by any comments made by Deputy Kennedy. (*People v. Belmontes* (1988) 45 Cal.3d 744, 774.) The trial court properly admitted appellant's pre-*Miranda* statements into evidence.

C. Voluntariness of waiver

Having determined that appellant's pre-*Miranda* statements were voluntary and not the product of custodial interrogation, we next turn to the actual advisement and waiver of his rights. Indeed, appellant conceded at trial he was properly advised of the *Miranda* warnings. Appellant's voluntariness arguments, however, necessarily implicate the validity of his waiver.

The determination of whether a defendant's waiver of his *Miranda* rights was knowing, intelligent, and voluntary involves "two distinct dimensions." (*Moran v. Burbine* (1986) 475 U.S. 412, 421; *People v. Clark, supra*, 5 Cal.4th at p. 986.) "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]" (*Moran v. Burbine, supra*, 475 U.S. at p. 421; *People v. Clark, supra*, 5 Cal.4th at p. 986.) All that is required is that the defendant comprehend all of the information that the police are required to convey by *Miranda*. (*People v. Clark, supra*, 5 Cal.4th at p. 987.) "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." (*Moran v. Burbine, supra*, 475 U.S. at pp. 422-423, fn. omitted.)

No particular manner or form is required to signify an acceptable waiver. (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 444-445; *In re Paul A.* (1980) 111 Cal.App.3d 928, 934-935.) A valid waiver may be express or implied. (*People v. Whitson* (1998) 17 Cal.4th 229, 246.) An express waiver is not required where a defendant's actions make clear that a waiver is intended. (*North Carolina v. Butler* (1979) 441 U.S. 369, 374-375.) "Although it may not be inferred 'simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained' (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 475…), it may be inferred where 'the actions and words of the person interrogated' clearly imply it. (*North Carolina v. Butler*[, *supra*,] 441 U.S. 369, 373 ….)" (*People v. Cortes* (1999) 71 Cal.App.4th 62, 69.) Thus, the question of waiver must be determined on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. (*North Carolina v. Butler, supra*, 441 U.S. at pp. 374-375.)

The prosecution has the burden to establish the validity of the defendant's waiver of his constitutional rights by a preponderance of the evidence. (*People v. Markham* (1989) 49 Cal.3d 63, 71; *People v. Kelly* (1990) 51 Cal.3d 931, 947; *People v. Clark, supra,* 5 Cal.4th at p. 987, fn. 12.)

Appellant was properly advised of his *Miranda* rights and gave a knowing and voluntary waiver in the ambulance. Indeed, appellant said he was very familiar with the *Miranda* warnings and tried to recite the advisements in tandem with Deputy Kennedy. He exhibited no signs of physical or psychological distress, and never requested an attorney or tried to stop the questioning. Appellant was very eager to give his side of the story: he insisted the deputy fired the first shots, he merely fired in the deputy's general direction, and he didn't intend to hurt the deputy. Appellant also insisted he accidentally fired his gun as he tried to climb into Mr. Mulholland's truck.

Again, as in *Breaux* and *Jackson*, there is no evidence that appellant suffered from any physical or psychological impairment to render his *Miranda* waiver as involuntary.

We note that at trial, appellant's cousin testified that appellant used methamphetamine for three days prior to the car chase and shooting. However, the criminalist testified that appellant's blood samples were negative for being under the influence of alcohol or any controlled substances, although the blood test could not detect trace amounts. Also at trial, the physician who treated appellant that night in the emergency room testified that appellant was mildly stressed but not in shock. The physician described appellant as oriented and very coherent. He spoke normally and gave rational responses. He was given pain medication, but the physician did not testify that this medication impaired his mental abilities in any way. Appellant did not present any evidence, at either the suppression hearing or the trial, to contradict the testimony of the health care professionals as to his physical and emotional condition that night. We thus conclude appellant's waiver of his *Miranda* rights was voluntary and not the result of any physical distress or psychological coercion.

D. Detective Murrietta's interrogation

Appellant also contends the trial court should have excluded his statements to Detective Murrietta. Appellant asserts that his statements to Murrietta were tainted by Deputy Kennedy's previous *Miranda* and voluntariness violations. Appellant's argument is based on the following legal principles set forth in *Sims*:

> "[W]here—as a result of improper police conduct—an accused confesses, and subsequently makes another confession, it may be presumed the subsequent confession is the product of the first because of the psychological or practical disadvantages of having '"let the cat out of the bag by confessing."' (See *People v. Johnson* (1969) 70 Cal.2d 541, 547 …; *People v. Spencer* (1967) 66 Cal.2d 158, 167 ….) Notwithstanding this presumption, 'no court has ever "gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed."' (*Spencer*, *supra*, 66 Cal.2d at p. 167, citing *United States v. Bayer* (1947) 331 U.S. 532, 540-541 …; see *United States v. Toral* (9th Cir. 1976) 536 F.2d 893, 896; *United States v. Knight* (2d Cir. 1968) 395 F.2d 971.) Thus, the foregoing presumption is rebuttable, with the prosecution

> bearing the burden of establishing a break in the causative chain between the first confession and the subsequent confession. (*Johnson, supra*, 70 Cal.2d at pp. 547-548; *In re Pablo C*. (1982) 129 Cal.App.3d 984, 990 ….)" (*People v. Sims, supra,* 5 Cal.4th at pp. 444-445.)

Appellant asserts Deputy Kennedy's improper interrogation prejudicially tainted any statements he made to Detective Murrietta, and there was no break in the causative chain. However, we have already concluded that appellant voluntarily made spontaneous statements in the ambulance, he was not interrogated, and he was properly advised and voluntarily waived his *Miranda* rights. There is no evidence as to any "misconduct" which "tainted" his post-*Miranda* statements to Murrietta.

Appellant next asserts Detective Murrietta was obliged to readvise him of the *Miranda* warnings. Appellant notes that Murrietta interrogated him several hours after the initial *Miranda* advisement in the ambulance, he had been treated at the hospital for his gunshot wounds, and he received pain medication. Appellant thus asserts these factors required readvisement of the warnings.

A defendant need not be readvised of his *Miranda* rights prior to each separate interrogation. (*People v. Braeseke* (1979) 25 Cal.3d 691, 701-702; *People v. Mickle* (1991) 54 Cal.3d 140, 170; *People v. Johnson* (1973) 32 Cal.App.3d 988, 997.) If defendant is subsequently interrogated, "readvisement is unnecessary where the subsequent interrogation is 'reasonably contemporaneous' with the prior knowing and intelligent waiver. [Citations.] The courts examine the totality of the circumstances, including the amount of time that has passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights. [Citations.]" (*People v. Mickle*, *supra*, 54 Cal.3d at p. 170.)

In *Mickle*, the court held that readvisement was not necessary where defendant twice received and twice waived *Miranda* rights 36 hours before the latter interview.

(*People v. Mickle, supra,* 54 Cal.3d at p. 171.) In *People v. Miller* (1996) 46 Cal.App.4th 412, 418, overruled on other grounds in *People v. Cortez* (1998) 18 Cal.4th 1223, 1239-1240, the court similarly held that readvisement was not required when defendant was informed of his *Miranda* rights at 8:32 p.m. and gave a statement, and the second interview occurred at 2:43 a.m. The court found no evidence that defendant was mentally impaired or otherwise incapable of remembering the prior advisement and agreeing to answer a few more questions. In *People v. Lewis* (2001) 26 Cal.4th 334, 386, the court found the passage of five hours did not reduce the effectiveness of defendant's initial waiver, particularly where defendant was mentally alert, spoke freely, and "'understood what was going on'" in the subsequent interrogation. (*Id.* at p. 386.)

As in *Mickle*, *Miller*, and *Lewis*, Detective Murrietta was not obliged to readvise appellant based on the circumstances of the interrogation. Paramedic Sumner testified appellant was escorted into the ambulance shortly after 12:16 a.m. When appellant made his spontaneous statements in the ambulance, about three minutes passed until Deputy Kennedy advised him of the *Miranda* warnings. Detective Murrietta contacted appellant at the police department at 5:30 a.m. Therefore, the second interview was reasonably contemporaneous with the *Miranda* advisement because less than five hours had passed.

While there was a change in the interviewer, appellant repeatedly expressed his knowledge and understanding of the *Miranda* warnings. When appellant spoke with Deputy Kennedy in the ambulance, he stated his familiarity with his *Miranda* rights and tried to recite the advisements along with Kennedy. Detective Murrietta asked if appellant wanted to be readvised, and appellant declined and again stated he knew his rights. Murrietta was aware that appellant had been shot and treated at the hospital, and asked about his physical status and whether he was suffering the effects of any medication or treatment. Appellant replied he was okay, and Murrietta described him as very cooperative and willing to give a statement. As set forth above, there is no evidence that appellant was physically or mentally impaired from remembering the prior

advisement. Indeed, there is overwhelming evidence of his subjective understanding of his *Miranda* rights. Detective Murrietta was not obliged to readvise appellant during the interview at the police department.

E. The nature of the interrogation

Appellant next asserts there was no investigative purpose for either Deputy Kennedy or Detective Murrietta to conduct any type of interview with him because the police were well aware of the circumstances of the offenses and did not need any additional information from appellant. Appellant's argument is based on a series of cases which discuss the fundamental distinction between an accusatorial and an inquisitorial system of justice.

Appellant's argument is primarily based on Justice Frankfurter's majority opinion in *Watts v. Indiana* (1949) 338 U.S. 49, in which a murder suspect was taken into custody and held for seven days until he gave an incriminating statement. The suspect was prevented from contacting friends or legal counsel, and a steady procession of officers interrogated him at all hours of the day and night until he gave them the statement they wanted. He was never advised of his constitutional rights, he was kept in solitary confinement, and he was never brought before a magistrate for an arraignment. (*Id.* at pp. 52-53.)

Watts condemned these procedures and held the suspect's confession had been obtained in violation of due process:

> "A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. We would have to shut our minds to the plain significance of what here transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting

> interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right." (*Watts v. Indiana, supra*, 338 U.S. at pp. 53-54.)

Justice Frankfurter then explained why coercive police practices, such as prolonged and relentless interrogation, food and sleep deprivation, sensory and physical isolation, and similar human indignities, are incompatible with the Anglo-American system of criminal justice:

> "… To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process. [¶] This is so because it violates the underlying principle in our enforcement of the criminal law. *Ours is the accusatorial as opposed to the inquisitorial system.* Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. [Citation.] Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.' 2 Hawkins, Pleas of the Crown, c. 46, § 34 (8th ed., 1824). The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands. Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. It is the inquisitorial system without its safeguards. For while under that system the accused is subjected to judicial interrogation, he is protected by the disinterestedness of the judge in the presence of counsel. [Citation.]" (*Watts v. Indiana, 338 U.S.* at pp. 54-55, italics added.)

Appellant seizes upon the emphasized language in *Watts* and asserts he was subject to a similar type of interrogation. Appellant specifically contends: "Kennedy and

Murrietta had no investigative need to interrogate appellant and, as the transcript reveals, had no purpose other than their persistent, unswerving focus on obtaining admissions or a confession from him." Appellant further asserts his interrogation "under the circumstances was fundamentally at odds with our accusatorial system of criminal justice" and violated his Fifth Amendment rights as stated in *Watts*.

Appellant's argument seems to be based on a scenario that lacks any connection to the actual facts of this case. The record is devoid of any evidence to compare appellant's interrogations with the horrific constitutional abuses perpetrated in *Watts*. Neither Deputy Kennedy nor Detective Murrietta engaged in any tactics "'so offensive to a civilized system of justice that they must be condemned.'" (*Colorado v. Connelly* (1986) 479 U.S. at 157, 163, quoting *Miller v. Fenton* (1985) 474 U.S. 104, 109; *People v. Bradford, supra,* 14 Cal.4th at p. 1043.) Indeed, appellant was so eager to give his statement that he attempted to advise himself of the *Miranda* warnings in the ambulance.

In addition, there was a clear investigative purpose for both interrogations. Appellant had been involved in a high speed chase in a stolen vehicle, and had been shot by a deputy during the pursuit. Deputy Kilner reported appellant turned and fired directly at him and he returned fire. Mr. Mulholland similarly asserted that appellant tried to shoot him when he jumped into the truck. The officers who investigated the scene discovered Deputy Kilner's expended casings, but they didn't find any .25-caliber casings in the street, the field, or inside Mr. Mulholland's truck. Appellant's spontaneous statements to Deputy Kennedy in the ambulance were intended to cast blame upon Deputy Kilner, as he insisted the deputy fired at him first and he merely shot back in the deputy's general direction but didn't intend to hurt him. Appellant also insisted he never meant to shoot at Mr. Mulholland. Thus, the investigating officers were presented with a situation in which they had to determine whether appellant intentionally shot at Deputy Kilner, the deputy preemptively fired during the dramatic pursuit, or any shots were even

fired at Mr. Mulholland. Appellant's attempt to compare his interrogations to the condemned practices in *Watts* borders on the frivolous.

F. Prejudice

Appellant asserts the introduction of his pre-*Miranda* statements in the ambulance, and his post-*Miranda* statements to Deputy Kennedy and Detective Murrietta, was prejudicial and requires reversal of his convictions. We have concluded that appellant's pretrial statements were spontaneous and voluntary, that he voluntarily waived his *Miranda* rights, and the statements were not obtained in violation of *Miranda*. However, we will address this argument in an abundance of caution.

The erroneous admission of an involuntary confession at trial is no longer reversible error per se. Instead, the conviction will be reversed if the introduction of the involuntary confession was not harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-312; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.) In addition, we review *Miranda* error under the harmless standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Johnson* (1993) 6 Cal.4th 1, 32-33.) "The *Chapman* test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Yates v. Evatt* (1991) 500 U.S. 391, 402-403.) "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question . . . ." (*Id.* at p. 403; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1165-1167.)

Even if appellant's pretrial statements were erroneously admitted, the entirety of the record reflects any error was harmless beyond a reasonable doubt because appellant greatly benefited from the prosecution's introduction of his pretrial statements. It was undisputed that appellant was driving a stolen car, he fired shots at Deputy Kilner, he jumped into Mr. Mulholland's truck and ordered him to drive, and he fired a shot which missed Mr. Mulholland's head by about 12 inches. In the absence of appellant's pretrial

statements, the jury would have only been presented with Deputy Kilner's testimony, which described a high-speed chase with a stolen car and a lengthy foot pursuit. Kilner testified that appellant suddenly stopped, turned around, and fired directly at him. Kilner returned fired and appellant continued to run. As the foot pursuit continued, appellant again stopped, turned around, and seemed about to fire again at the deputy. Kilner fired and appellant continued to run.

Appellant had been charged with attempted premeditated murder of a peace officer. However, the jury found him guilty of the lesser offense of attempted voluntary manslaughter. This verdict can only be explained by reference to appellant's pretrial statements, in which he insisted that he didn't aim at the deputy and didn't intend to hurt him. The record thus infers that appellant's own statements led to his conviction of the lesser offense because there was no other evidence that would have supported this conviction.

As to the attempted kidnapping and carjacking of Mr. Mulholland, appellant was also charged with the special allegations of personally and intentionally discharging a firearm (§ 12022.53, subd. (c)). However, the jury found appellant did not personally and intentionally discharge his firearm at Mr. Mulholland, even though Mr. Mulholland testified that appellant tried to shoot him and the bullet passed within 12 inches of his head. Again, the jury's finding can only be based on appellant's pretrial statements, in which he insisted that he didn't intentionally fire at Mr. Mulholland but his handgun accidentally discharged as he tried to climb into the passenger side of the truck cab.

The entirety of the record reflects appellant's pretrial statements were properly admitted. Even if the statements should have been excluded, any error is necessarily harmless beyond a reasonable doubt given the nature of the jury's verdict and the entirety of the record.

II.

DEPUTY KILNER AS THE DESIGNATED INVESTIGATIVE OFFICER

Appellant next contends the trial court improperly allowed Deputy Kilner to sit at the prosecution table as the investigative officer because he was the victim of the offenses. Appellant argues Kilner was not the investigating officer because he never filed a report about the incident, and his presence at the prosecution table could have elicited sympathy from the jury.

A. Background

On May 1, 2000, appellant's trial began with the hearing on his motion to exclude his pretrial statements. On May 2, jury selection was conducted and the opening statements were given.

On May 3, the prosecution prepared to present its evidence, and moved to exclude witnesses from the courtroom. The record infers the prosecution also designated Deputy Kilner as the investigating officer. Appellant objected to this designation because Deputy Kilner was one of the victims of the charged offenses. The court overruled appellant's objection. Thereafter, the prosecution began its case with the testimony of Mr. Speechly and his son about the theft of their vehicle. The prosecution's next witness was Deputy Kilner. After the completion of Deputy Kilner's testimony, the prosecution called Mr. Mulholland. The court adjourned for the day with the prosecution having completed its direct examination of Mr. Mulholland.

On May 4, appellant again objected to Deputy Kilner being designated as the investigating officer and moved to exclude Deputy Kilner from the courtroom because he was the victim of the charged offenses. Appellant asserted Deputy Kilner was not actually the investigating officer, based on Deputy Kilner's trial testimony that he was questioned by other officers about the car chase and shooting, and he never filed a report about the incident. The court denied the motion without comment. Deputy Kilner

remained at the prosecution table for the remainder of the trial, and he was never recalled as a witness.

B. Analysis

Appellant contends the trial court abused its discretion in allowing Deputy Kilner to remain in the courtroom and sit at the prosecution table during trial. Evidence Code section 777 provides:

> "(a) Subject to subdivisions (b) and (c), the court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses.
>
> "(b) A party to the action cannot be excluded under this section.
>
> "(c) If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present."

The exclusion of witnesses from the courtroom is a matter within the trial court's discretion. (*People v. Valdez* (1986) 177 Cal.App.3d 680, 687; *People v. Ortega* (1969) 2 Cal.App.3d 884, 894; *People v. Garbutt* (1925) 197 Cal. 200, 205-207.) The purpose of the order is to prevent tailored testimony and aid in the detection of less than candid testimony. (*Geders v. United States* (1976) 425 U.S. 80, 87; *People v. Valdez*, *supra*, 177 Cal.App.3d at p. 687.)

In the exercise of its discretion, the court may grant a motion to exclude witnesses but permit certain of them to remain. (*People v. Carella* (1961) 191 Cal.App.2d 115, 141-142.) One such exception is that the People of the State of California, as a party to a civil case or criminal prosecution, is entitled to the presence of the investigating officer as designated by its attorney. (*People ex rel. Curtis v. Peters* (1983) 143 Cal.App.3d 597, 602-603.)

> "It has long been the general practice to permit some officer, active in the prosecution of the case, to remain for the purpose of advising the district attorney as to the facts, the interest and character of the witnesses, etc. Such a practice is proper and charges that such officer or witness has abused his privilege should be first brought to the knowledge of the trial

> court, that they may be corrected, if there be any ground for the charge." (*People v. Boyden* (1953) 116 Cal.App.2d 278, 283-284.)

"It is the common and usual practice that at least one peace official may remain during the presentation of evidence during the entire case." (*People v. Chapman* (1949) 93 Cal.App.2d 365, 374; see also *People v. Nunley* (1904) 142 Cal. 441, 445 [the court did not abuse its discretion in allowing sheriff who was a witness for the prosecution, to remain in the courtroom during trial].) In the absence of any showing of prejudice that would probably arise from the presence of the investigating officer, the court does not abuse its discretion in allowing the officer to remain in court. (*People v. Boyden*, *supra*, 116 Cal.App.2d at p. 284; *People v. Halbert* (1926) 78 Cal.App. 598, 613.)

In the instant case, the prosecution designated Deputy Kilner as the investigative officer. Deputy Kilner was the officer who observed appellant driving a stolen car, saw the car chase and foot pursuit, the exchange of gunshots, and the attempted kidnapping of Mr. Mulholland. Deputy Kilner testified on the first day that evidence was taken, and was never recalled to the stand by either party. The only witnesses who testified prior to Deputy Kilner were Mr. Speechly and his son. The Speechlys' testimony addressed the theft of their vehicle by an unknown individual several days before appellant's arrest, and did not implicate any issues addressed by Deputy Kilner. Thus, there was no danger of Deputy Kilner using his presence in the courtroom to improperly tailor his testimony to corroborate the testimony of the other witnesses.

Appellant contends he was prejudiced by Deputy Kilner's presence at the prosecution table because Deputy Kilner was a victim of the charged offenses. Appellant asserts the presence of the victim at the prosecution table might have elicited sympathy from the jury and been prejudicial. Appellant cites *People v. Haskett* (1990) 52 Cal.3d 210, in which defendant argued a juror was coerced into returning the verdict because of the presence of the victims' family in the courtroom. During deliberations, the foreman informed the court that a particular juror refused to deliberate or participate in the jury's

discussions. The court called that juror into the courtroom and conducted a hearing as to whether the juror was following the instructions. The victims' family members were present in the courtroom when the juror reaffirmed that he was following the instructions and deliberating. Thereafter, the jury returned its guilty verdict. (*Id.* at pp. 235-238.) On appeal, defendant argued the presence of the victims' family when the juror was questioned by the court added "pressure and coercion" and resulted in the guilty verdict. However, *Haskett* noted the defendant's family members were also present during the jury inquiry. "We find no relevance in the fact that some members of the victim's family were sitting on the 'plaintiff's' side of the courtroom, closest to the jury box." (*Id.* at p. 239.)

Appellant acknowledges that *Haskett* rejected any implication that the juror was somehow coerced by the presence of the victim's family on the prosecution's side of the courtroom. However, appellant relies on a contrasting Mississippi case, *Fuselier v. State* (Miss. 1985) 468 So.2d 45, which *Haskett* cited in passing. Appellant asserts the instant situation is similar to *Fuselier* and a series of cases from other states.

In *Fuselier v. State, supra,* 468 So.2d 45, the court found error based on the victim's daughter being seated at the prosecution's table, and concluded her presence could not be justified "by Rule 501 of the Uniform Criminal Rules of Circuit Court Practice and further that it constituted an inflammatory and prejudicial element. With reference to Rule 501, [the victim's daughter] was neither an officer of the court, attorney, litigant or representative of a litigant. Her presence at counsel table and open display of emotion presented the jury with the image of a prosecution acting on behalf of [her]. Because such an erroneous view can all too easily lead to a verdict based on vengeance and sympathy as opposed to reasoned application of rules of law to the facts we conclude that the trial court should not have permitted [her] to remain within the bar of the courtroom." (*Id.* at p. 53, fn. omitted.)

Appellant also relies on *Walker v. State* (Ga.App. 1974) 208 S.E.2d 350, in which the trial court allowed the deceased victim's mother to sit at the prosecution's table along with the investigating officer. The jury was present when her identity as the victim's mother was disclosed. *Walker* held the trial court abused its discretion when it found the victim's mother had a right to sit at the prosecution's table: "The presence of the bereaved mother at the prosecutor's table during the trial of one accused of murdering her son surely must have had an impact on the jury and we cannot say it was not harmful and prejudicial to the defendant's right to have a fair trial. There was no showing by the state that her presence was necessary for an orderly presentation of the case." (*Id.* at p. 350.)

Appellant also relies on a series of Idaho cases, in which the court held: "Ordinarily witnesses (other than a defendant) should not be seated at counsel table unless a showing is made to the trial judge of the necessity of having the witness present with counsel to facilitate the trial of the case. Whether a witness should be allowed to remain at counsel table is addressed to the discretion of the trial court." (*State v. Shaw* (Idaho 1975) 539 P.2d 250, 254; see also *State v. Smoot* (Idaho 1978) 590 P.2d 1001, 1008.)

Finally, appellant relies on *Mask v. State* (Ark. 1993) 869 S.W.2d 1, in which defendant argued that allowing the victim to sit at the prosecution's table after she testified, directly in front of the jury, unduly emphasized her testimony and unfairly prejudiced him.[7] *Mask* found the placement of the victim at the prosecution's table represented an attempt to manipulate the seating arrangement "to emphasize the testimony of certain witnesses over others," and was "tantamount to the Trial Court expressing an opinion on the credibility of witnesses." (*Id.* at p. 4.) *Mask* concluded that

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[7] Appellant erroneously cites the court's earlier opinion in *Mask v. State* (Ark. 1993) 858 S.W.2d 108, which was superceded by the above citation upon denial of rehearing.

in the absence of an authorizing state statute, the trial court could not allow the seating of the victim to effectively constitute a comment on the evidence. (*Ibid.*)

Appellant relies on these cases from Mississippi, Georgia, Idaho, and Arkansas, and argues Deputy Kilner's presence at the prosecution table was similarly prejudicial. We note that the decisions of sister states are persuasive only in the absence of controlling California authority. (*Gutierrez v. Superior Court* (1994) 24 Cal.App.4th 153, 170; *Bellflower Education Assn. v. Bellflower Unified School Dist*. (1991) 228 Cal.App.3d 805, 810-811, fn. 2.) However, this state has long upheld the trial court's discretion to designate a law enforcement officer as the investigating officer who may remain at the prosecution table during the entirety of trial. (See *People v. Barrett* (1968) 267 Cal.App.2d 135, 145; *People v. Gentemann* (1962) 201 Cal.App.2d 711, 718; *People v. White* (1950) 100 Cal.App.2d 836, 838.)

The decisions from our sister states involved the presence of individuals at the prosecution table who were not associated with the law enforcement investigation in any way. Their presence was solely based on their status as victims or family members of victims, and could be interpreted as the court's implicit acceptance of their credibility. In contrast, Deputy Kilner was present at the prosecution's table solely in his role as the prosecution's investigating officer. While he was alleged as the victim of two charges, these allegations were based on conduct which occurred while Deputy Kilner was on duty and pursuing appellant as he drove a stolen vehicle. The fact that he did not file a report about the incident did not diminish his status as the law enforcement officer who was primarily familiar with the facts and circumstances of appellant's case. Neither the court nor the prosecution used Deputy Kilner's presence to appeal to the jury for sympathy, and there is no evidence that Deputy Kilner engaged in any type of emotional conduct to draw the jury's attention and concern.

We thus conclude the trial court did not abuse its discretion in granting the prosecution's motion to designate Deputy Kilner as the investigating officer at trial. He

testified on the first day of trial and was not recalled to the stand, and there was no possibility that he sought to improperly tailor his testimony to corroborate other witnesses. As the law enforcement officer who was primarily familiar with appellant's conduct, his presence at the table was not based on his status as a victim, designed to elicit sympathy, or carried an implicit aura of credibility. Aside from mere speculation, appellant has failed to show that he was prejudiced in any way by Deputy Kilner's presence in the courtroom. (*People v. Gentemann, supra,* 201 Cal.App.2d at p. 718; *People v. White, supra*, 100 Cal.App.2d at p. 838; *People v. Foster* (1920) 48 Cal.App. 551, 554; *People v. Persky* (1959) 167 Cal.App.2d 134, 139.)

III.

CROSS-EXAMINATION OF HAROLD BALL

Appellant next contends the court improperly allowed the prosecution to cross-examine Harold Ball as to being in custody at the time of trial and suffering a prior felony conviction for "child endangerment."

A. Background

As set forth above, Harold Ball testified for the defense that he heard the large caliber shots fired before the small caliber shots, and appellant didn't look back when he fired. During cross-examination, Ball conceded he told the police that night that he couldn't see who was doing any of the shooting. At trial, however, Ball insisted that he actually saw the people who were doing the shooting, and admitted that he lied to the police when he gave his statement that night. The following exchange then occurred:

> "[THE PROSECUTOR:] Mr. Ball, you are currently in custody. Is that correct?
>
> "A Yes.
>
> "Q And it's very dangerous for someone who is in custody to come in and testify against someone who is charged with criminal crimes, isn't it?

"[DEFENSE COUNSEL:] Objection. Relevance. [Section] 352.

"THE COURT: Overruled.

"[THE PROSECUTOR:] Bias, motive.

"Q It's very dangerous to do that, isn't it?

"A To do what?

"Q To come in and testify against someone in their criminal trial.

"A Yeah. I would say so.

"Q You could get beat up if you testified against [appellant], couldn't you?

"A Yeah, I guess if I told myself to beat myself up I would probably get in trouble, yeah.

"Q Well, other inmates might come and beat you up, mightn't they, if they heard you testified in a way that hurt [appellant's] case?

"A You never know."

Appellant's counsel again objected as calling for speculation, and the objection was overruled.

"[THE PROSECUTOR:] When you spoke to the police officers, you weren't in custody, were you?

"A No.

"Q You were aware that people have been attacked and brutally beaten and sometimes killed for testifying against other people charged with criminal charges."

Appellant's counsel objected for relevance and prejudice, and assuming facts not in evidence. The prosecutor rephrased the question.

"[THE PROSECUTOR:] Isn't it true, Mr. Ball, that you are aware that an inmate who comes in and testifies against a person accused of criminal charges may be inviting a savage attack and/or death?

"A I've done it many times myself; so, yes, I am aware."

On redirect-examination, Ball testified he was on parole at the time of appellant's arrest, and he was working and trying to stay clean. He further testified:

> "Actually, the first question [the police] asked me was, you know, -- I told them that the kid was lucky I was there, because if I wasn't they would have killed him. And they said they didn't want to hear that. So at that point, you know, I didn't tell them anything. Plus, you know, I just didn't want to . . ."

On recross-examination, the prosecutor asked if he was convicted in 1995 of "felony inflicting injury upon a child." Appellant's counsel objected pursuant to Evidence Code section 352. The court overruled the objection and found the probative value was not substantially outweighed by the prejudicial effect. Thereafter, Ball testified he was convicted of "child endangerment." He also admitted that he suffered two prior convictions in 1988: possession of a controlled substance for sale in Sacramento, and "assault with deadly force, [other than a] firearm" in Madera. He had been in custody in the Wasco facility for the past two months, and hadn't spoken to appellant or anyone in his family.

B. Analysis

We first consider the prosecution's impeachment of Ball based on his custody status. In determining the credibility of a witness, the jury may consider, among other things, "[t]he existence or nonexistence of a bias, interest, or other motive" for giving the testimony. (Evid. Code, § 780, subd. (f); *People v. Price* (1991) 1 Cal.4th 324, 422.) Evidence showing a witness's bias or prejudice, or which goes to his credibility, veracity or motive may be elicited during cross-examination. (*People v. Howard* (1988) 44 Cal.3d 375, 428; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1054.)

The trial court enjoys broad discretion pursuant to Evidence Code section 352 in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusing, or consumption of time. (*People v. Lewis, supra*, 26 Cal.4th at p. 374.) "'[T]he latitude section 352 allows for exclusion of impeachment

evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 301.) Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. (*Ibid.*; *People v. Lewis, supra*, 26 Cal.4th at p. 375.)

The court's exercise of its discretion will not be disturbed on appeal without a showing that such discretion was exercised in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) A miscarriage of justice occurs only when it is reasonably probable the jury would have reached a result more favorable to the appellant in the absence of the error. (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1331.)

Appellant insists that Ball's status as an inmate was not relevant and was prejudicial. Appellant argues there is no logical connection between his custodial status and the prosecution's assertion that he could be beaten as a result of his testimony. To the contrary, the prosecution's cross-examination sought to establish that Ball changed his story in order to testify favorably to appellant. Ball initially told the police that he didn't see the actual exchange of gunfire. When Ball testified at trial, after he was taken into custody on unrelated charges, he changed his story and claimed that appellant would have been killed by Deputy Kilner and the other officers if Ball hadn't drawn attention to his presence at the scene. The prosecution validly sought to establish that once Ball was in custody, he changed his testimony to be more favorable to appellant to avoid the possibility of any retribution in prison. The court did not abuse its discretion in permitting cross-examination on this issue.

We next turn to the prosecution's impeachment of Ball with his prior conviction for "child endangerment. "For the purpose of attacking the credibility of a witness, it may be shown ... that he has been convicted of a felony ...." (Evid. Code, § 788.) But the

felony must involve moral turpitude, i.e., a "'readiness to do evil.'" (*People v. Castro* (1985) 38 Cal.3d 301, 314; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1435.) Additionally, the trial court must weigh the probative value of permitting use of the felony conviction against its possible prejudice pursuant to section 352. (*People v. Gutierrez, supra,* 14 Cal.App.4th at p. 1435.)

Appellant asserts the prosecution improperly impeached Ball with his prior conviction for "child endangerment." Appellant correctly notes that in *People v. Sanders* (1992) 10 Cal.App.4th 1268, 1270, this court held that a felony conviction of child endangerment, in violation of Penal Code section 273a, subdivision (a), was not a crime of moral turpitude for purposes of impeachment under *Castro*.

However, there is no clear evidence as to the exact nature of Ball's prior conviction. The prosecutor initially inquired whether Ball was convicted of "felony inflicting injury upon a child" in 1995. After an objection, Ball replied, "[c]hild endangerment. Yeah." Appellant's objection was based on Evidence Code section 352, and he did not assert the conviction was not one of moral turpitude under *Castro*. Thus, there was no mention of the particular code section which constituted the prior conviction.

As noted by respondent, the exchange between the prosecutor and Ball could also be consistent with his prior conviction for inflicting corporal punishment on a child resulting in trauma, in violation of Penal Code section 273d. A violation of section 273d is an offense of moral turpitude for purposes of impeachment under *Castro*. (*People v. Brooks* (1992) 3 Cal.App.4th 669, 671; *People v. Campbell* (1994) 23 Cal.App.4th 1488, 1493.)

In any event, any alleged error from the use of this prior conviction for purposes of impeachment is harmless beyond a reasonable doubt. (*People v. Watson* (1956) 46 Cal.2d 818; *People v. Gutierrez, supra,* 14 Cal.App.4th at p. 1436.) Ball was also impeached with his prior convictions for possession of a controlled substance for sale and

"assault with deadly force, [other than a] firearm." Both these convictions are for offenses of moral turpitude. (*People v. Vera* (1999) 69 Cal.App.4th 1100, 1103; *People v. Chavez* (2000) 84 Cal.App.4th 25, 29-30; *People v. Lindsay* (1989) 209 Cal.App.3d 849, 857; *People v. Elwell* (1988) 206 Cal.App.3d 171, 177.)

IV.

APPELLANT'S PRIOR BURGLARY CONVICTIONS

Appellant next contends his three prior convictions for burglary in Illinois do not constitute serious felonies in California for purposes of the serious felony enhancement and the three strikes law. In order to address this difficult issue, we must determine the appropriate standard to evaluate the Illinois burglary statute, and whether the terms "theft" and "inhabited dwelling" have the same meaning in Illinois and California.

A. Background

The first amended information alleged appellant suffered three prior serious felony convictions within the meaning of section 667, subdivision (a), and the three strikes law (§§ 667, subd. (b)-(i), 1170.12). These special allegations were based on three separate convictions for burglary on January 1, 1997 in Jefferson County, Illinois, in case No. 97CF69, in violation of "720 ILCS 5/19-3 (A)." The amended information alleged these three prior convictions were serious felonies in California.

After appellant was convicted of the charged offenses, the court conducted the bifurcated hearing on the prior conviction allegations. Appellant waived a jury trial, and the court heard evidence on the Illinois prior convictions. The prosecutor introduced documentary evidence consisting of a "pen pack" from the Illinois Department of Corrections, which was similar to the Penal Code section 969b package used in California. An identification technician from the Fresno Police Department testified the fingerprints attached to the Illinois "pen pack" were identical to appellant's known fingerprints.

The prosecution also introduced copies of the applicable Illinois statutes. The court granted the prosecution's request to take judicial notice of the relevant Illinois statutes.

The Illinois "pen pack" simply consisted of minute orders and/or abstracts of judgment reflecting appellant's prior convictions in Illinois. As relevant for the serious felony allegations, one document consisted of the May 14, 1997, "SENTENCING JUDGMENT" from the Illinois Department of Corrections in case No. 97-CF-69. It stated that Raymond L. Henson was sentenced to the Illinois Department of Corrections for three counts of "Residential Burglary," in violation of "720 5/19-3(a)," a "Class 1" offense. All the offenses were committed in March 1997. He was sentenced to concurrent terms of four years for each count. The document was signed by the presiding judge of the circuit court.

The prosecution did not present any additional evidence as to appellant's prior burglary convictions, such as the reporter's or clerk's transcripts or any details concerning the nature of the offenses. Instead, the prosecutor argued the elements of residential burglary in Illinois were sufficiently similar to the elements of residential burglary as defined in California Penal Code section 459.

Appellant asserted the statutes were not similar because the Illinois burglary statute did not require entry into an inhabited dwelling. Instead, the Illinois statute defined a dwelling as a house or other living quarters in which the owners actually reside or intend to reside within a reasonable period of time. Appellant argued this definition was far different from California's definition of a dwelling. Appellant also pointed out there was no evidence as to the specific "residences" which were involved in the three burglary convictions. "In speaking to my client, he's indicated that at least one of them was a garage." Appellant thus concluded the Illinois burglary statute did not include an inhabited dwelling, and the three prior convictions were not serious felonies in California.

The prosecutor replied that a residential burglary would occur in California "so long as the place is intended to be used as a dwelling," even if the occupant was on vacation or temporarily traveling.

The court noted that CALJIC No. 14.52 defined an inhabited dwelling house as a structure which is occupied and currently used as a dwelling, even if the occupants are temporarily absent. Appellant replied that being "[t]emporarily absent" was not the same as the Illinois definition of a structure which was "intended to be inhabited within a reasonable period of time."

The court acknowledged appellant's argument but it wasn't convinced, and was "satisfied" the offenses were "essentially the same, at least substantially the same." Thereafter, the court found the prior conviction allegations to be true, and that appellant's burglary convictions in Illinois were serious felonies in California.

B. Serious felonies

Appellant asserts there is insufficient evidence that his burglary convictions in Illinois were serious felonies in California, and the court improperly imposed the third strike terms and the serious felony enhancement.

"Various sentencing statutes in California provide for longer prison sentences if the defendant has suffered one or more prior convictions of specified types." (*People v. Woodell* (1998) 17 Cal.4th 448, 452.) A prominent example is a conviction of a "serious felony" as defined in Penal Code section 1192.7, subdivision (c). Conviction of a serious felony has substantial sentencing implications under the three strikes law (§§ 667, subd. (d)(1), 1170.12, subd. (d)(1)), and also under section 667, subdivision (a)(1), which mandates a five-year sentence enhancement for each such conviction. (*People v.*

Woodell, supra, 17 Cal.4th at p. 452.) Section 1192.7, subdivision (c)(18) defines residential burglary as a serious felony.[8]

In determining whether a conviction from another jurisdiction is a serious felony, "the trier of fact may consider the entire record of the proceedings leading to imposition of judgment on the prior conviction to determine whether the offense of which the defendant was previously convicted involved conduct which satisfies all of the elements of the comparable California serious felony offense." (*People v. Myers* (1993) 5 Cal.4th 1193, 1195.) This includes trial court documents, such as the preliminary hearing transcript, and documents that may be part of the record on appeal for the prior offense, including the appellate opinion reviewing the prior conviction. (*People v. Woodell, supra*, 17 Cal.4th at pp. 454-456.)

When the record does not disclose any of the facts of the offense actually committed, a presumption arises that the prior conviction was for the least offense punishable. (*People v. Guerrero* (1988) 44 Cal.3d 343, 352; *People v. Johnson* (1991) 233 Cal.App.3d 1541, 1548.) If the prosecution only offers the abstract of judgment, such evidence proves nothing more than the least adjudicated elements of the prior offense. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 262.) Under the "least adjudicated elements" test, "only the foreign jurisdiction's statutory or common law definition of the offense may be considered to determine if the offense would be a serious felony in California. Only the elements of the offense which must be proved to sustain a conviction of the offense are considered in deciding if the offense 'includes all of the

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8 Proposition 21, approved in 2000, amended section 1192.7, subdivision (c)(18), to refer to "'any burglary of the first degree.'" This does not appear to be a substantive change. As relevant here, "'[e]very burglary of an inhabited dwelling house'" is first degree burglary. (§ 460, subd. (a).) (*People v. Avery* (2002) 27 Cal.4th 49, 53, fn. 3; *People v. Garrett* (2001) 92 Cal.App.4th 1417, 1421.)

elements of the particular felony as defined under California law.'" (*People v. Myers*, *supra*, 5 Cal.4th at p. 1199.)

The prosecution has the burden of proving the serious or violent nature of the prior felony offense beyond a reasonable doubt. (*People v. Tenner* (1993) 6 Cal.4th 559, 566; *People v. Rodriguez*, *supra*, 17 Cal.4th at p. 262.) If, upon analysis of the elements of the predicate offense, we determine that the prior conviction could have been based on acts not specified in Penal Code section 1192.7, subdivision (c), then, as a matter of the sufficiency of the evidence, the least offense punishable was not a serious felony, and the prior conviction may not be used to impose a sentence pursuant to the three strikes law. (*People v. Rodriguez, supra*, 17 Cal.4th at pp. 261-262; *People v. Guerrero, supra*, 44 Cal.3d at pp. 348-355; *People v. Cortez* (1999) 73 Cal.App.4th 276, 280.)

In the instant case, the prosecutor only introduced the Illinois "SENTENCING JUDGMENT" to prove appellant suffered three prior convictions for "Residential Burglary" in violation of a specific criminal statute. The prosecutor did not present any evidence from the "entire record of the proceedings" as to the factual circumstances of these offenses. Therefore, our inquiry is limited to reviewing the language of the Illinois and California statutes to determine if appellant's prior offenses are serious felonies, pursuant to the least adjudicated elements test. (*People v. Rodriguez, supra*, 17 Cal.4th at pp. 261-262; *People v. Cortez, supra*, 73 Cal.App.4th at p. 280.)

C. <u>Residential burglary</u>

We begin with the statutory definitions of residential burglary at issue in this case. In Illinois, residential burglary is defined in chapter 720, act 5, article 19-3 of the Illinois Compiled Statutes ("720 ILCS 5/19-3"), as follows:

> "(a) A person commits residential burglary who knowingly and without authority enters … the dwelling place of another … with the intent to commit therein a felony or theft…."
>
> "(b) Sentence. Residential burglary is a Class 1 felony."

"The gist of the offense is the defendant's felonious intent with which he or she enters the dwelling, which the State must prove beyond a reasonable doubt." (*People v. Maggette* (Ill. 2001) 747 N.E.2d 339, 349.) The offense is complete upon entering with the requisite intent. The actual commission of the intended offense is irrelevant. (*Ibid.*)

California Penal Code section 459 provides:

> "Every person who enters any house [or other statutorily enumerated premises] with intent to commit grand or petit larceny or any felony is guilty of burglary."

California Penal Code section 460, subdivision (a) provides:

> "Every burglary of an inhabited dwelling house [and other specified dwelling places], or the inhabited portion of any other building, is burglary of the first degree."

"All other kinds of burglary are of the second degree." (§ 460, subd. (b).) First degree burglary is punishable by imprisonment in state prison for two, four, or six years. Second degree burglary is punishable by imprisonment in county jail not exceeding one year or in the state prison. (§ 461.) One may by liable for burglary upon entry with the requisite intent to commit a felony or a theft (whether felony or misdemeanor), regardless of whether the felony or theft committed is different from that contemplated at the time of entry, or whether any felony or theft actually is committed. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042.)

Appellant challenges two aspects of the Illinois and California burglary statutes. First, he points to the language in the Illinois statute as to entry "with the intent to commit therein a felony or theft." Appellant asserts the definition of theft in Illinois is substantially different from the definition of theft in California. Appellant's second challenge addresses the statutory definition of an "inhabited dwelling," and he argues Illinois's definition is much broader than California's definition of that term.

D. Commission of felony or theft therein

Appellant contends the residential burglary offenses are different based on the element of specific intent to commit a felony or theft therein. Illinois statute 720 ILCS 5/19-3 defines burglary as entry with "intent to commit therein a felony or theft." Chapter 720, act 5, article 16-1, subdivision (a) of the Illinois Compiled Statutes ("720 ILSC 5/16-1, subd. (a)") defines "theft" as follows:

> "(a) A person commits theft when he knowingly:
>
> "(1) Obtains or exerts unauthorized control over property of the owner; or
>
> "(2) Obtains by deception control over property of the owner; or
>
> "(3) Obtains by threat control over property of the owner; or
>
> "(4) Obtains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen; or
>
> "(5) Obtains or exerts control over property in the custody of any law enforcement agency which is explicitly represented to him by any law enforcement officer or any individual acting in behalf of a law enforcement agency as being stolen, and
>
> "(A) Intends to deprive the owner permanently of the use or benefit of the property; or
>
> "(B) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or
>
> "(C) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit."

Under Illinois's statute, a person commits theft when he knowingly obtains or exerts unauthorized control over property of the owner, and intends to deprive the owner permanently of the use or benefit of the property. (*People v. Glisson* (Ill.App. 5 Dist. 2001) 754 N.E.2d 444, 447; *People v. Gilliam* (Ill. 1996) 670 N.E.2d 606, 617.)

California Penal Code section 459 defines burglary as entry "with intent to commit grand or petit larceny *or any felony*." (Italics added.) Penal Code section 484, subdivision (a) defines theft as follows:

> "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.…"

Grand theft is generally the theft of more than $400 or equivalent value. (§ 487.) It is a "wobbler" punishable as a misdemeanor by imprisonment in county jail, or as a felony by imprisonment in state prison. (§ 489.) "Theft in other cases is petty theft" and is a misdemeanor punishable by a fine of not more than $1,000 or six months in county jail. (§§ 488, 490.)

Appellant and respondent agree that Illinois's definition of theft in 720 ILSC 5/16-1, subdivision (a)(4) includes the offense of receiving stolen property. They also agree that California's definition of theft, as stated in Penal Code section 484, does not include receiving stolen property. Appellant argues this difference means that Illinois's theft statute is broader than California's statute, and that a person could commit residential burglary in Illinois without committing the same offense in California based on the nature of the underlying theft offense.

However, respondent correctly points out that receiving stolen property is a wobbler offense that may constitute a felony in California. (Pen. Code, § 496, subd. (a).) Under such circumstances, an individual's entry into a residence with intent to commit felonious receipt of stolen property would constitute a residential burglary in California, based on the person's entry with the intent to commit a felony therein.

Appellant points to another distinction in Illinois's theft statute. Illinois statute 720 ILSC 5/16-1, subdivision (a) defines the mens rea of theft to include the intent to permanently deprive the owner of "the use or benefit" of his or her property. (*People v. Cortez* (Ill.App. 1 Dist. 1975) 326 N.E.2d 232; *People v. Sherman* (Ill.App. 2 Dist. 1992) 441 N.E.2d 896, 901-902; *People v. Hamilton* (Ill. 1997) 688 N.E.2d 1166, 1169.)

Appellant correctly notes that California's theft statute requires the specific intent to permanently deprive the owner of his or her property. (*People v. Jaso* (1970) 4 Cal.App.3d 767, 771; *People v. Marquez* (1993) 16 Cal.App.4th 115, 123.) Appellant thus asserts the permanent deprivation of the owner's "use or benefit" of the property is much broader than depriving the owner of the property itself.

Respondent asserts that Illinois has interpreted its theft statute to essentially encompass the same permanent deprivation of property as required in California. Respondent's argument is based on *People v. Jones* (Ill. 1992) 595 N.E.2d 1071, in which the court discussed the mens rea required for theft:

> "The crime of theft requires proof of two mental states. The theft statute initially requires that a person act knowingly in obtaining control over the property of another. [Citation.] Additionally, the theft statute requires that a person have the intent (or other mental state as specified in the statute) to deprive the owner permanently of the use or benefit of the property." (*People v. Jones, supra,* 595 N.E.2d at p. 1075.)

Jones further addressed whether the instructions for robbery in that case also defined the specific intent required for theft:

> "We also hold that the information implicitly set forth the second mental state required for a theft conviction, that is, the intent (or other mental state as set forth in the statute) *to permanently deprive the victim of the property*. When a robbery is committed or attempted, common sense dictates that the perpetrator either 'intends to deprive the owner permanently of the use or benefit of the property; or [k]nowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or [u]ses . . . the property knowing such use . . . probably will deprive the owner permanently of such use or benefit.' [Citation.] Therefore, the mental state required in the second

> portion of the theft statute was implicitly set forth in the information charging Jones with armed robbery." (*People v. Jones*, *supra*, 595 N.E.2d at pp. 1075-1076, italics added.)

Respondent points to the emphasized language and asserts there is essentially no difference between the definitions of the requisite mens rea in California and Illinois. However, respondent's reliance on *Jones* is misplaced because the emphasized language simply represented a summary of the statute previously discussed in the opinion. The cases which have interpreted Illinois's theft statute repeatedly require the permanent deprivation of the "use or benefit" of the property, rather than simply the permanent deprivation of the property itself. (*People v. Hamilton*, *supra*, 688 N.E.2d at p. 1169.)

Appellant asserts that Illinois's language of denying the "use or benefit" of the property is substantially different from California's definition of mens rea. Appellant's argument is based on *People v. Marquez, supra*, 16 Cal.App.4th 115, in which the court compared the mens rea required in section 484 with the mens rea of theft under Oregon law. Oregon required the intent "'to deprive another of property or to appropriate property [of another's] ....'" (*People v. Marquez, supra,* 16 Cal.App.4th at p. 123.)

> "This intent element is statutorily defined under Oregon law as either the intent to permanently deprive another of property or the intent to acquire the property, or deprive the owner of the property, 'for so extended a period or under such circumstances' that the owner loses or the perpetrator acquires the major portion of the economic value or benefit of the property.'" (*People v. Marquez, supra,* 16 Cal.App.4th at p. 123, italics omitted.)

Marquez found that California and Oregon required two different types of mens rea for theft:

> "The intent to acquire, or deprive an owner of, 'the major portion of the economic value or benefit' of his or her property is not equivalent to the intent to permanently deprive an owner of his or her property. A person who intends only to temporarily deprive an owner of property, albeit while acquiring or depriving the owner of the main value of the property, does not intend to permanently deprive the owner of the property and therefore does

> not have the intent to commit theft, as that crime is defined under California law." (*People v. Marquez, supra,* 16 Cal.App.4th at p. 123, italics omitted.)

Appellant thus asserts that Illinois's requirement for the permanent deprivation of the "use or benefit" of the owner's property is similar to the language in the Oregon statute, and does not constitute the same specific intent required by California's theft statute.

However, the California Supreme Court recently addressed this state's definition of theft, in light of *Marquez* and other state statutes which contain broader language. In *People v. Avery, supra,* 27 Cal.4th 49, the trial court found defendant suffered a prior serious felony conviction, based on his conviction in Texas for "'burglary of a habitation with intent to commit theft.'" (*Id.* at p. 52.) Defendant argued the statutory elements of theft in Texas were different, or at least appeared different, than the elements in California. If it was possible to intend theft under Texas law but not under California law, then the Texas conviction would not necessarily be a serious felony in California. (*Ibid.*)

> "California courts have long held that theft by larceny requires the intent to *permanently* deprive the owner of possession of the property. [Citation.] The Texas theft statute, however, requires only the 'intent to deprive the owner of property.' [Citation.] 'Deprive' is defined as 'withhold[ing] property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner ....' [Citation.]" (*People v. Avery, supra,* 27 Cal.4th at p. 54.)

Avery presented the issue presented as whether "the intent to deprive the owner of property only temporarily, but for so extended a period of time as to deprive the owner of a major portion of its value or enjoyment, satisfy the California requirement of intent to deprive the owner of the property permanently. . ." (*People v. Avery, supra,* 27 Cal.4th at p. 54.)

Avery discussed *Marquez* and *People v. Davis* (1998) 19 Cal.4th 301, in which the courts addressed the definitions of larceny and theft but failed to address the issue presented by the Texas statute.

> "The time has now come to decide the question, although, due to the way in which it arises, we do so in the abstract without a concrete factual context. We now conclude that an intent to take the property for so extended a period as to deprive the owner of a major portion of its value or enjoyment satisfies the common law, and therefore California, intent requirement. We start by noting that California's statute does not itself expressly require an intent to permanently deprive. Rather, it merely says that, to be guilty of theft, the person must 'feloniously steal' the property; it does not further define the intent requirement. (§ 484, subd. (a).) But the 'statute is declaratory of the common law' and so includes the common law intent requirement. (*Davis, supra*, 19 Cal.4th at p. 304, fn. 1.) The reference to the intent to permanently deprive is merely a shorthand way of describing the common law requirement and is not intended literally. Thus, to determine the exact nature of California's intent requirement, we must turn to the common law." (*People v. Avery*, *supra*, 27 Cal.4th at p. 55.)

Avery reviewed common law and California cases, and concluded "'the intent to deprive an owner of the main value of his property is equivalent to the intent to permanently deprive an owner of property.'" (*People v. Avery*, *supra*, 27 Cal.4th at p. 57.)

> ". . . [T]he language in section 484, subdivision (a), referring to an intent to 'feloniously steal,' reasonably construed, adopted the common law intent requirement. That requirement, although often summarized as the intent to deprive another of the property permanently, is satisfied by the intent to deprive temporarily but for an unreasonable time so as to deprive the person of a major portion of its value or enjoyment." (*People v. Avery, supra,* 27 Cal.4th at p. 58.)

Avery thus disapproved *Marquez's* interpretation of the theft statute. (*People v. Avery, supra,* 27 Cal.4th at pp. 58-59.)

As in *Avery*, Illinois's requirement of the permanent deprivation of the "use or benefit" of property is equivalent to California's requirement of the permanent deprivation of the property itself. We thus conclude there are no disparities between the theft statutes in California and Illinois for purposes of finding appellant's convictions for residential burglary in Illinois, under the least adjudicated elements test, constitute serious felonies in California.

E. Inhabited dwelling

Appellant next contends that Illinois's definition of a "dwelling" is much broader than California's definition of an "inhabited dwelling" for purposes of the residential burglary statutes.

As set forth above, a residential burglary is committed in Illinois when a person, knowingly and without authority, enters the "dwelling place of another" with intent to commit a felony or theft therein. (720 ILCS 5/19-3.) For purpose of residential burglary, chapter 720, act 5, article 2-6, subdivision (b) of the Illinois Compiled Statutes ("720 ILCS 5/2-6, subd. (b)") defines a "dwelling" as "'a house, apartment, mobile home, trailer, or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or *in their absence intend within a reasonable period of time to reside*.'" (*People v. Taylor* (Ill.App. 1 Dist. 2000) 742 N.E.2d 357, 365, italics added.)

Appellant asserts the emphasized language in the Illinois statute is much broader than the definition of an "inhabited dwelling" contained in California Penal Code section 459:

> "'[I]nhabited' means *currently being used* for dwelling purposes, *whether occupied or not*. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises." (§ 459, italics added.)

A review of some relevant cases shows the definitions are not dissimilar. The Illinois courts have held the purpose of the residential burglary offense is to impose a greater penalty for burglarizing places where there is a substantial likelihood that people might be present, as this presents greater threat to public safety. (*People v. Walker* (Ill.App. 5 Dist. 1991) 570 N.E.2d 1268, 1270.) The offense of residential burglary is not intended to cover structures such as vacant buildings or garages, but does cover vacation homes and the like. (*Ibid*.)

In *People v. Sexton* (Ill.App. 4 Dist. 1983) 455 N.E.2d 884, the court found it "clear from the language used by the legislature that the residential burglary statute was intended to apply to burglaries of structures intended for use as residences, regardless of whether the structure was being actively used as a residence at the time the burglary was committed. In enacting the residential burglary statute, the legislature sought to deter burglaries of citizens' homes by making such burglaries Class 1 felonies, differentiating those burglaries from the offense of simple burglary, which is a Class 2 felony. This legislative purpose of deterring residential burglaries would not be served by making the application of the statute dependent upon the wholly fortuitous circumstance of whether a structure intended to be used as a residence was actually being used as a residence at the time the burglary was committed." (*Id.* at p. 886.)

In *People v. Moore* (Ill.App. 1 Dist. 1990) 565 N.E.2d 154, the fact that the occupant of the house intended to sell the house after returning from a month-long absence did not alter the house's character as a "dwelling place" for purposes of residential burglary offense. The occupant had intended to and did return to the house, and had checked on the house both before and after the burglary occurred. "The residential burglary statute applies to burglaries of structures intended for use as residences, regardless of whether the structure was being actively used as a residence at the time of the burglary." (*Id.* at p. 156.)

In *People v. Silva* (Ill.App. 1 Dist. 1993) 628 N.E.2d 948, the court held that unoccupied first-floor and basement apartments in an apartment building were "dwellings" for purposes of residential burglary statute, and thus defendant's burglary of those apartments was residential burglary, even though no one had lived in them for more than seven months, the apartment owner lived on the second floor, and the owner was renovating the apartments for future habitation. (*Id.* at pp. 952-953.)

In *People v. Walker, supra,* 570 N.E.2d 1268, the court found a house which had been unoccupied for approximately one year qualified as "dwelling" for purposes of

residential burglary because the owner–occupier was in poor health and living in a nursing home at time of burglary, but hoped to return to premises as soon as his health permitted. (*Id.* at pp. 1269-1270.)

In *People v. Bonner* (Ill.App. 1 Dist. 1991) 583 N.E.2d 56, the court reversed defendant's conviction because the state conceded a house was not a "dwelling" for purposes of residential burglary because the house had not been occupied for over seven years, due to death of one owner and illness of another, and there was no expectation that house would be occupied. (*Id.* at p. 58.)

Perhaps the broadest definition of a "dwelling" was provided in *People v. Pearson* (Ill.App. 5 Dist. 1989) 538 N.E.2d 1202, in which the court found that a vacant residential rental property to which the new tenant was planning within a reasonable period of time to move and establish residence was a "dwelling," within the meaning of residential burglary offense. (*Id.* at p. 1203.)

As in Illinois, the distinction between an inhabited and uninhabited dwelling is pivotal in California's law of burglary. (*People v. DeRouen* (1995) 38 Cal.App.4th 86, 91, disapproved on other grounds in *People v. Allen* (1999) 21 Cal.4th 846, 865-867.) Only the burglary of inhabited dwellings constitutes burglary in the first degree, a serious crime meant to protect important societal policies. (*People v. Cardona* (1983) 142 Cal.App.3d 481, 483; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 847.)

"[C]ourts have explained that the term 'inhabited dwelling house' means a 'structure where people ordinarily live and which is currently being used for dwelling purposes. [Citation.]'" (*People v. Cruz* (1996) 13 Cal.4th 764, 776.) Case law has expanded the definition of "inhabited dwelling house" to include areas not normally considered part of the "'living space'" of a home. (*People v. Woods* (1998) 65 Cal.App.4th 345, 347-348.)

In keeping with the purpose of the statute, the term "inhabited dwelling house" has been given a "broad, inclusive definition." (*People v. Cruz, supra,* 13 Cal.4th at pp. 776,

779; *People v. Fox* (1997) 58 Cal.App.4th 1041, 1045-1046.) Penal Code section 459 "clearly states a house remains 'inhabited' despite the fact it is empty at the time of the burglary. Furthermore, a house remains inhabited even if the burglary occurs while the residents are away for an extended period of time." (*People v. Cardona, supra,* 142 Cal.App.3d at p. 483; *People v. DeRouen, supra,* 38 Cal.App.4th at p. 91.) "[N]either section 459 nor section 460 contains any requirement that a defendant have knowledge that a dwelling house is inhabited in order to commit the crime of first degree burglary." (*People v. Guthrie, supra,* 144 Cal.App.3d at p. 847.)

Moreover, "[w]here a dwelling was previously inhabited, it does not become 'uninhabited' ... until the residents leave never again intending to return to use the dwelling as sleeping quarters." (*People v. Jackson* (1992) 6 Cal.App.4th 1185, 1189; *People DeRouen, supra*, 38 Cal.App.4th at p. 91.) The "'"inhabited-uninhabited" dichotomy turns not on the immediate presence or absence of some person but rather on the character of the use of the building.'" (*People v. Marquez* (1983) 143 Cal.App.3d 797, 801.) "[T]he proper question is whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusion." (*People v. Brown* (1992) 6 Cal.App.4th 1489, 1496, italics omitted; *People v. DeRouen, supra,* 38 Cal.App.4th at p. 92.) Thus, the terms "'residence'" and "'inhabited dwelling house'" have been interpreted to have equivalent meanings. (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1107; *People v. Thomas* (1991) 235 Cal.App.3d 899, 907.)

A series of cases seems to address appellant's argument as to whether an "inhabited dwelling" in California is included within Illinois's broad definition of living quarters where the owners, in their absence, intend within a reasonable period of time to reside. In *People v. Valdez* (1962) 203 Cal.App.2d 559, a burglary of a house occurred on March 9, 1961, when the previous tenant had moved out a week earlier. The owner had rented the premises to a new tenant whose occupancy was scheduled to begin on

March 13. The new tenant had not moved any belongings into the house and had not had the utilities connected. (*Id.* at pp. 562-563.) *Valdez* held that the burglary could not be of the first degree because no one resided there. (*Id.* at p. 563.)

In *People v. Cardona*, *supra*, 142 Cal.App.3d 481, a burglary of a house took place on September 13, 1981. A family had moved out of the house and had spent the night of September 12 in their new residence. However, they had not completed moving their belongings from the house, and they had paid rent there until September 15. (*Id.* at p. 482.) The court held defendant could not have been convicted of first degree burglary, because the house was no longer inhabited. The court stated the house became uninhabited when the tenants moved out, not intending to return there to live. (*Id.* at p. 483.) *Cardona* held: "[B]ecause a burglary is of the first degree only if it is of an inhabited house at night, the crucial element in determining whether a house is being used for dwelling purposes is whether anyone sleeps in it [citation]." (*Ibid.*)

After the decisions in *Cardona* and *Valdez*, the burglary statute was amended to eliminate the requirement that a burglary take place at night for it to be first degree burglary. (Stats. 1982, ch. 1297, § 1, p. 4786.) "Thus, the Legislature has rejected the view, expressed in prior case law, that the use of a house as sleeping quarters is critical. [Citation.] Rather, such use is merely one circumstance the fact finder may consider." (*People v. Hernandez* (1992) 9 Cal.App.4th 438, 441.)

In *People v. Hernandez, supra*, 9 Cal.App.4th at p. 441, the court held that the evidence was sufficient to show an apartment was an inhabited dwelling, even though the tenants had just moved in, had never slept in the apartment before the burglary, and had not unpacked their belongings. The tenants had the utilities connected, moved all their belongings into the apartment, and intended to occupy it as their residence. The apartment was thus occupied by them as a place of settled residence from which they were merely temporarily absent. *Hernandez* noted that *Valdez* and *Cardona* were no longer controlling authorities given the amendment of the burglary statute, and it was no

longer an element of first degree burglary that it take place at night. Thus, the use of a house as sleeping quarters was not critical to a finding of first degree burglary. (*Id.* at pp. 441-442.)

We thus conclude that California's definition of an "inhabited dwelling" is as broad as Illinois's definitional statute, as a place where the owner, in a reasonable time, intends to reside.

V.

CRUEL AND/OR UNUSUAL PUNISHMENT

Appellant next contends his sentence of 36 years, with a consecutive third strike term of 54 years to life, constitutes cruel and/or unusual punishment under the state and federal Constitutions. Appellant also contends the trial court should have granted his motion to dismiss one or two of his prior strike convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

The purpose of the three strikes law is not to subject a criminal defendant to a life sentence merely on the basis of the latest offense. Rather, the purpose is to punish recidivist behavior. (*People v. Diaz* (1996) 41 Cal.App.4th 1424, 1431; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630-1631.) Habitual offender statutes have withstood constitutional scrutiny based on assertions of cruel and unusual punishment, as well as claims of a disproportionate sentence. (See *People v. Ayon* (1996) 46 Cal.App.4th 385, 398-401.)

Appellant was not sentenced to a life term solely on the basis of the instant offense, but because of his record as a recidivist offender previously convicted of numerous serious and/or violent felonies. Appellant, who was born in 1978, has a lengthy juvenile and adult criminal record. In 1988, he was placed on informal probation for stealing two bicycles. A few months later, he was again placed on informal probation for stealing another bicycle from his school. In 1989, he was placed on informal

probation yet again for stealing property from a storage shed, and from a vending machine inside a store.

In 1990, appellant and two accomplices broke into a food mini-mart. He was made a ward of the juvenile court and placed on probation for burglary (Pen. Code, § 459). In 1992, appellant and two accomplices broke into a sports store, stole a small amount of money, ransacked the desks, and drank beer from the store's kitchen. He was continued on juvenile probation for burglary. In 1992, appellant and two accomplices broke into a house and stole two VCRs, a watch, flashlight, knife, and tools. He was placed on probation for residential burglary (Pen. Code, §§ 459, 460.)

According to the probation report, appellant was made a dependent child of Fresno County in 1990 because of his mother's heroin habit, and he was placed in foster and group homes. In 1994, however, he ran away from Fresno County to Illinois, where his mother was living.

Appellant's adult record began in Mount Vernon, Illinois. In July 1996, he was convicted of second degree burglary and placed on probation.

In March 1997, while appellant was still on probation for the prior burglary, he was arrested for three counts of residential burglary in Mount Vernon, Illinois. In May 1997, he was convicted, his probation was revoked on the prior case, and he was sentenced to concurrent terms of four years in state prison. In 1998, he was convicted of possession of contraband in prison and received a concurrent one year term.

In May 1999, appellant was released on parole in Illinois. However, he never reported to his parole officer in Illinois and he was an absconder at the time of the instant offenses. The probation report characterized appellant "at the tender age of 22," as a "career criminal." When the probation officer asked appellant to think about his potential life sentence, appellant said "he could learn to adjust to anything," and expressed his gratitude "to be serving the time in California rather than Illinois because his family is here."

Appellant asserts the third strike terms are inappropriate because he has no history of violence and "made one very serious mistake" when he committed the instant offenses and shot at the deputy and Mr. Mulholland. Appellant also asserts there was "substantial evidence" he did not shoot first, and he had been using methamphetamine and not sleeping for three days prior to the incident.

Given the lengthy and serious nature of his prior record, appellant is precisely the type of offender from whom society seeks protection by use of recidivist statutes. In evaluating the factors set forth in *In re Lynch* (1972) 8 Cal.3d 410, appellant's sentence is not so disproportionate to the crime that it shocks the consciousness, and it does not violate the state constitutional prohibition against or unusual punishment. (*People v. Stone* (1999) 75 Cal.App.4th 707, 715; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1509-1516; *People v. Barrera* (1999) 70 Cal.App.4th 541, 555; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1337-1338; *People v. Cooper* (1996) 43 Cal.App.4th 815, 825-828; *People v. Kinsey, supra*, 40 Cal.App.4th at pp. 1630-1631; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1135-1137.)

In addition, appellant cannot demonstrate that his sentence violates the prohibition against cruel and unusual punishment contained in the federal Constitution. (*Harmelin v. Michigan* (1991) 501 U. S. 957, 994-995; *Rummel v. Estelle* (1980) 445 U. S. 263, 284-285; *People v. Cooper, supra*, 43 Cal.App.4th at pp. 820-825.)

In *People v. Martinez, supra*, 71 Cal.App.4th 1502, defendant argued the three strikes law is unconstitutional because it lacks any measurement of culpability for the current offense, and is a totally arbitrary law. *Martinez* rejected this argument:

> "Defendant contends that California's recidivist statute is unconstitutional because it is among the most extreme in the nation. That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require 'conforming our Penal Code to the "majority rule" or the least common

> denominator of penalties nationwide.' (*People v. Wingo* (1975) 14 Cal.3d 169, 179.…) Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct. [¶] '[T]he needs and concerns of a particular state may induce it to treat certain crimes or particular repeat offenders more severely than any other state.... [¶] Whether a particular punishment is disproportionate to the offense is a question of degree. The choice of fitting and proper penalty is not an exact science but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will. In some cases, leeway for experimentation may be permissible. Thus, the judiciary should not interfere in the process unless a statute prescribes a penalty "'out of all proportion to the offense.'"' (*People v. Cooper, supra*, 43 Cal.App.4th at p. 827, quoting *In re Lynch, supra*, 8 Cal.3d at pp. 423-424.)" (*People v. Martinez, supra*, 71 Cal.App.4th at p. 1516.)

Appellant also complains the trial court should have granted his motion to dismiss one or two prior convictions pursuant to *Romero* and Penal Code section 1385. The review of a trial court's decision whether or not to dismiss a prior strike under section 1385, like most other discretionary trial court rulings, is limited in scope. (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 434; see also *People v. Benevides* (1998) 64 Cal.App.4th 728, 735.) This is true in part because appellate courts must give great deference to discretionary trial court rulings and will disturb them only upon a clear showing of abuse which results in a manifest miscarriage of justice. (See *People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Here, the record establishes the trial court acted to achieve legitimate sentencing objectives, after a thoughtful and conscientious assessment of all relevant factors. (See *People v. Williams* (1998) 17 Cal.4th 148, 161-164; see also *People v. Superior Court (Romero), supra,* 13 Cal.4th at p. 530.) The court partially granted appellant's motion to dismiss as to count V, unlawfully taking or driving Mr. Speechly's vehicle, and declined to impose a third strike sentence for that offense pursuant to *People v. Garcia, supra,* 20 Cal.4th 490. For the balance of appellant's convictions, the court determined the third strike terms were appropriate given the nature and circumstances of appellant's prior

history and the offenses herein, and stated: "I just don't see anything in here redeeming." Based on appellant's lengthy record, the court did not abuse its discretion in denying his motion to dismiss the prior strike convictions, and appellant has not shown the trial court acted improperly in refusing to dismiss his prior strike convictions. (*People v. Barrera, supra,* 70 Cal.App.4th at pp. 553-555; *People v. Cline, supra*, 60 Cal.App.4th at pp. 1336-1337.)

DISPOSITION

The judgment is affirmed.

_____
Harris, J.

WE CONCUR:

_____
Vartabedian, Acting P.J.

_____
Cornell, J.